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Supreme Court, U.S.
FILED

No. 081183 MAR 20 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

PETER ANTHONY ANTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1989 Peter Anthony Anton was placed on probation pursuant to Florida Statute 948, the Florida withholding statute, with a sentence suspended **with the right to possess firearms**. His judgment stated that if he violated probation he would then be adjudicated guilty. Florida law allows a person not to be convicted even if "adjudicated" if he successfully completes probation pursuant to Florida Statute 948. The trial court as a matter of law found the Petitioner to be a convicted felon utilizing the wrong case law in support of its findings.

The questions presented in this criminal case are:

1. DOES THE DECISION BELOW CONFLICT WITH *U.S. v. ESSICK*, 935 F.2d 28 (4th Cir. 1991), AND *U.S. v. SHOEMAKER*, 2 F.3d 53 (4th Cir. 1993), ON ESSENTIALLY THE SAME SET OF FACTS AND ISSUE OF LAW, AND WAS THE PETITIONER THEREBY DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A MEANINGFUL DEFENSE TO HIS JURY?

2. DOES THE DECISION BELOW OFFEND THE FOURTH AMENDMENT BY IMPROPERLY EXPANDING THE SCOPE OF *U.S. v. LEON*'S "GOOD FAITH EXCEPTION" TO THE EXCLUSIONARY RULE WHERE THE AGENT EXECUTING THE SEARCH WARRANT WAS THE SAME AGENT WHOSE SWORN APPLICATION

QUESTIONS PRESENTED – Continued

FOR THE WARRANT CONTAINED DELIBERATELY OR RECKLESSLY FALSE STATEMENTS, AND WAS OTHERWISE LACKING IN PROBABLE CAUSE, THUS NEGATING ANY POSSIBILITY THAT THE AGENT POSSESSED AN "OBJECTIVE GOOD FAITH RELIANCE" UPON THE WARRANT BEING FACIALLY VALID?

LIST OF PARTIES

All parties appear in the caption of the page on the cover page.

LIST REQUIRED BY RULE 14.1(b) AND 29.6

Pursuant to this Court's Rule 14.1(b), the party who was the Appellant below in the U.S. Court of Appeals, Eleventh Circuit, is Peter Anthony Anton. Pursuant to this Court's Rule 29.6, Petitioner certifies that he is an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Peter Anton has been convicted and sentenced to a term of confinement for possession of firearms in his home. The basis of his conviction is flawed since under Florida law his adjudication was suspended. He respectfully petitions this Honorable Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, rendered on October 30, 2008, affirming the Petitioner's conviction for possession of a firearm by a convicted felon, with rehearing and rehearing *en banc* denied on December 24, 2008.

OPINION BELOW

The Eleventh Circuit's decision below (App. 1) is reported at *United States v. Anton*, 546 F.3d 1355 (11th Cir. 2008). The December 24, 2008, Order denying rehearing and rehearing *en banc* appears at App. 33.

JURISDICTION

The decision below (hereinafter Decision) was rendered on October 30, 2008. A timely motion for rehearing and rehearing *en banc* was denied on December 24, 2008. Jurisdiction to review the Decision below by writ of certiorari is conferred on this

Court by Title 28 U.S.C. §1257(a), and Rule 10(c), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petition raises issues under the Fourth, Fifth and Sixth Amendments of the U.S. Constitution, as set forth in Petitioner's Appendix.

STATEMENT OF THE CASE

A. Underlying Facts and Proceedings Below

On August 22, 2006, Petitioner Anton was indicted, along with his wife, Edna Anton, (App. 106). Anton was charged with possessing thirteen firearms, as well as ammunition, as a convicted felon, in violation of Title 18 U.S.C. §§922(g), 924(a)(2) and 2. Anton's initial arrest occurred on December 28, 2005, at his home following an execution of a search warrant by ATF agents and local police.

On January 22, 2007, Anton's attorney filed a Motion to Suppress Evidence challenging the constitutionality of the search warrant, asserting a lack of probable cause based upon the staleness of the information, the unreliability of the unnamed confidential informant, and the insufficiency of the facts. Following an evidentiary hearing the district court denied the motion.

Anton also filed two separate Motions to Dismiss asserting, *inter alia*, that based upon Florida state law Anton was not a "convicted felon" and thus could not be guilty of the Federal crime charged, and that the district court's refusal to allow Anton to prove and argue this essential element to his jury deprived Anton of his Fifth and Sixth Amendment rights to present a defense. The trial court denied both motions.

On April 5, 2007, Anton pled guilty, reserving his right to appeal the trial court's pretrial rulings. Following a sentencing hearing, Anton was sentenced to seventy months in prison.

B. Facts Pertaining to Questions Presented

(i) Anton's only prior state court judgment was suspended and therefore he was never convicted

On March 20, 1989, Anton had entered a negotiated plea of *nolo contendere* to one count of grand theft, in the Eighth Judicial Circuit, Levy County, Florida. This sole suspended sentence was the predicate conviction upon which the federal crime charged was erroneously based. Pursuant to this plea, the state trial judge, Osee R. Fagan, "withheld the imposition of sentence" as permitted under Section 948.01(1) and (2), Florida Statutes, and instead placed Anton on Probation for five years. The statute Judge Fagan utilized is known as the withholding of

adjudication statute. The order placing Anton on probation stated:

> It appearing to the satisfaction of the court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law . . . (App. 10).

This language tracks verbatim the language in Section 948.01(2), Fla.Stat., which grants trial courts discretion to "withhold the adjudication of guilt" and to "stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation." Section 948.01(2), Fla.Stat. Judge Fagan stated in his judgment that "it is ordered and adjudged that the imposition of sentence is hereby withheld, and that you be placed on probation for a period of five (5) years." The order specifically listed eight "conditions of probation." Condition number four stated:

> (4) You will neither possess, carry, or own any weapons or firearms *without first securing the consent of your probation officer.* (App. 14) (emphasis added).

Anton successfully completed his probation and on April 16, 1992, Judge Stan R. Morris "ordered that the defendant be discharged from probation and that the proceeding in this case be terminated *pursuant to Florida Statutes.*" (Emphasis added).

(ii) The search warrant and supporting affidavit

On December 27, 2005, U.S. Magistrate Judge Allan Kornblum issued a one-page search warrant authorizing Special Agent Shannon B. Desmond of the Alcohol, Tobacco, Firearms and Explosives Agency (ATF) to search two residences and vehicles belonging to Anton in Chiefland, Florida. The application for the warrant was supported by a thirteen-page affidavit and nine pages of attachments signed by Agent Desmond (App. 86). The warrant authorized the seizure of "[f]irearms, ammunition and firearms and ammunition receipts," based upon Agent Desmond's assertion that Anton was a previously-convicted felon. During the December 28, 2005, execution of this search warrant a number of firearms and a quantity of ammunition was seized from Anton's residences and property.

The application for the warrant, and the warrant itself, described the premises to be searched as:

> A residence and vehicles located at [Home Address Omitted]; and a residence located at [Home Address Omitted].

Special Agent Desmond's application (as well as Attachment A attached thereto) described the two vehicles to be searched as:

> A 1980 Tailgator mobile trailer, Florida tag E09KPB . . . and a 1995, green, Dodge Ram 2500 Club Cab pickup truck, Florida tag E84KPB.

On page 2 of Agent Desmond's affidavit (paragraph 4), Agent Desmond, in her attempt to establish that Anton was a "convicted felon," incorrectly stated that Anton had "*pled guilty* to Grand Theft, a felony offense, case number 88-387CFB in the Circuit Court and was *sentenced* to a term of 5 years probation." In fact, Anton had pled *nolo contendere* to this charge, rather than "guilty," which is a crucial legal distinction under Florida law when determining whether a person has been "convicted." Moreover, under Florida law imposition of probation is not a "sentence."

The entire first half of Agent Desmond's affidavit, up to page 7 (paragraphs 1-18) traces the history of a handful of firearms from November, 2000, to August, 2004, based on another arrest on the same charge which was subsequently dropped in the Middle District of Florida. Those guns were returned to Edna Anton, who was not a convicted felon and had a legal right to possess them. None of these facts and allegations were relevant to Peter Anton or the crime he was charged with. To the extent these allegations might support an inference that these firearms might be in a residence registered to Peter Anton (where his wife, Edna, also lived), this transfer of firearms to Edna occurred on August 9, 2004, more than sixteen months prior to the application for the search warrant. The firearms in question were found in a nearby residence owned by Anton's mother, locked in a trunk.

A reading of Agent Desmond's entire affidavit reveals she possessed no direct, first-hand knowledge of Anton possessing any firearms, either on his

person or at his residence. Rather, all of the "facts" set forth therein relevant to Anton's charged offense was second and third-hand hearsay related to Agent Desmond by either an unnamed confidential informant (C.I.) or by other named and unnamed ATF agents. In the entire thirteen-page affidavit consisting of thirty-five numbered paragraphs, there are only two incidents where it was alleged that Anton actually possessed a firearm. In paragraph 19 (page 7) Agent Desmond stated an unnamed C.I. had "advised" her that Anton "was observed on Saturday, July 2, 2005, and Sunday, July 3, 2005, at a gun show in West Palm Beach . . . " where Anton allegedly "sold two firearms" to a licensed gun dealer. The affidavit fails to clarify *who* "observed" Anton at this show. In paragraph 22 (page 8) Agent Desmond stated two fellow ATF agents "told" her that on July 16, 2005, they had observed Anton handling "at least two handguns" at a gun show at the Melbourne Auditorium. Both of these incidents allegedly occurred more than five months prior to the application for the warrant and hundreds of miles from Anton's residence.

The affidavit's *sole* basis for asserting any probable cause for believing that firearms and/or ammunition might be found in Anton's residences or vehicles is set forth in paragraph 29, consisting of a bald, speculative hunch by Agent Desmond:

> 29. Based upon your affiant's past experience and training as a Special Agent with ATF your affiant knows that convicted felons

> and dealers of firearms, who possess firearms, commonly maintain firearms, ammunition, sales receipts and other documents related to the ownership of said firearms and ammunition in their residences. These receipts may be evidence of a "straw purchaser" who bought firearms from a licensed dealer for the convicted felon, or may be typewritten or handwritten receipts to or from individual buyers or sellers. Additionally, your affiant knows that convicted felons who possess firearms (and indeed anyone who possessed firearms) commonly store firearms and ammunition for those firearms in their residences or other secure areas on their property.

This self-serving, generic, boilerplate tautological *opinion* (not a fact), which applies equally to any alleged criminal and crime, constitutes the affidavit's entire basis for probable cause.

In her affidavit, Agent Desmond misstates and misidentifies the vehicles she asserts that she had personally observed, such as Anton's 'mobile trailer'" which she claimed to have seen at various gun shows. She obviously gained the information off the Internet, yet she asserted that she believed this "mobile trailer" was utilized by Anton to transport guns to said gun shows, and that this "mobile trailer" was seen by her at Anton's residences. Agent Desmond identified this "mobile trailer" as "a 1980 Tailgator mobile trailer, Florida tag E09KPB utilized by ANTON to transport gun show goods . . . ," and she

further stated that she had personally reviewed "State of Florida Department of Motor Vehicles records," and had "verified that this 'mobile trailer'" was "registered in the name of Peter A. ANTON." This was an impossibility, since she had identified an ancient boat trailer which Agent Desmond swore that "within the last 3 months your affiant has personally observed this 'motor home' on two occasions parked next to a large out building located on ANTON'S Chiefland, Florida residential premises." Finally, Agent Desmond stated that she "knows as a result of the continuing investigation" that ANTON continues to use the same mobile trailer, noted in paragraph 5 to the gun shows." *See* Application for Search Warrant, paragraphs 5 and 31 of Affidavit (pages 2 and 12 respectively), as well as Attachment "A" to the Affidavit (page 14), (App. 86).

Contrary to Agent Desmond's sworn assertions, allegedly based upon her personal observations, "Florida tag E09KPB" was at all times registered to, and attached to, a *boat trailer* registered to Anton, which was always stored in a building on Anton's property, out of sight from the street and out of public view. Moreover, while Agent Desmond's Application for a Search Warrant (and the supporting affidavit) repeatedly identifies Anton's "1995 green, Dodge Ram 2500 Club Cab pickup truck, Florida Tag E84KPB" as the truck Anton used to tow the "mobile trailer" to gun shows, this tag had expired at the time Agent Desmond applied for the search warrant and this truck was no longer in use.

(iii) The pretrial motions

a) The motions to dismiss

On February 5, 2007, Anton filed his Defendant's Motion to Dismiss for Lack of Jurisdiction [Motion to Dismiss I], asserting that under Florida law Anton was not a "convicted felon" and thus, as a matter of law he could not be guilty of the crime charged in the indictment (App. 106). On February 7, 2007, Anton filed his Motion to Terminate Conditions of Release, again arguing that pursuant to controlling Florida law Anton was not a "convicted felon."

On February 14, 2007, following an evidentiary hearing, the District Court entered a four-page Order Denying Anton's Motion to Dismiss (App. 14). Anton filed a Motion for Reconsideration which was summarily denied on February 22, 2007.

On March 30, 2007, Anton filed his Defendant's Motion to Dismiss and/or Request to Acknowledge Defendant's Right to Present an Affirmative Defense that his Civil Rights had been Restored by the Court's Order and by Operation of Law [Motion to Dismiss II] (App. 46), again asserting that under Florida law and various precedents Anton was not a "convicted felon," and simultaneously moving the District Court for leave to assert this as an affirmative defense.

On April 5, 2007, the District Court conducted a hearing on Anton's Motion to Dismiss II. The Court denied the motion and Anton then entered his guilty

plea, reserving his right to appeal the denial of "all pretrial motions."

b) The motion to suppress

On January 22, 2007, Anton filed Defendant's Motion to Suppress Evidence Seized Pursuant to Executed Search Warrant and Supporting Memorandum of Law (App. 57). Attached thereto was a copy of the search warrant, the one-page application, and the thirteen-page supporting affidavit, as well as the thirteen pages of "attachments" appended to said application for a search warrant. The motion challenged the constitutionality of the search warrant, asserting a lack of probable cause based upon the staleness of the information, the unreliability of the unnamed C.I. and the insufficiency of the facts. Anton also asserted that the Magistrate had implicitly abandoned his judicial role and merely rubber-stamped the search warrant application where the record showed the Magistrate only spent nine minutes reviewing the twenty-three page application and affidavit. Finally, Anton argued that the affidavit identified the wrong license plate numbers on the vehicles, suggesting Special Agent Desmond was less than honest in her affidavit's stated grounds for probable cause.

On February 14, 2007, the District Court conducted an evidentiary hearing on Anton's Motion to Suppress (as well as on his Motion to Dismiss I). On March 22, 2007, the Court rendered an eleven-page

order denying Anton's Motion to Suppress (App. 19). After rejecting Anton's various constitutional challenges to the warrant, the Court held that the "good faith exception" to the exclusionary rule, as set forth in *United States v. Leon*, 468 U.S. 897 (1984), was applicable to this case.

C. The Decision Below

On direct appeal Anton raised three issues relevant to this certiorari petition.[1] The first two claims challenged the District Court's denial of Anton's two motions to dismiss, respectively. Anton argued that the Trial Court's error in denying the motions resulted in Anton being convicted of a crime (possession of a firearm by a convicted felon) for which he was not guilty as a matter of fact and law because Anton was not a "convicted felon" under Florida law (Issue I on appeal); and that the court's order prohibiting Anton from presenting evidence and argument to this jury to establish he was not a convicted felon deprived Anton of his Sixth Amendment right to present a meaningful defense pursuant to *Holmes v. South Carolina*, 126 S.Ct. 272 (2006). Both of these interrelated issues converge in the first question presented in this certiorari petition.

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[1] Anton's fourth appellate issue challenged the 70-month sentence. The Eleventh Circuit vacated the sentence and remanded for resentencing wherein Anton was sentenced to 56-months incarceration.

In his third claim raised on direct appeal, Anton argued that the District Court erred in denying his motion to suppress the evidence based upon a constitutionally infirm search warrant, and particularly that the court erred in holding that the "good faith exception" to the exclusionary rule, as articulated by this Court in *United States v. Leon*, 468 U.S. 897 (1984), applied in this case so as to excuse the constitutional deficiencies contained in the search warrant and supporting affidavit at bar in this case. This appellate issue underlies the second question presented in this certiorari petition.

On October 30, 2008, the Eleventh Circuit Court of Appeals rendered its 9-page decision rejecting Anton's three challenges to the conviction as described above and affirming Anton's conviction. *See* App. 1. As to Anton's first claim on appeal (that under Florida law Anton was not a "convicted felon"), the Court of Appeals first correctly noted that in determining whether a person charged in Federal Court is guilty of possessing a firearm as a convicted felon, Title 18 U.S.C. §921(a)(2) mandates that "what constitutes a conviction . . . [is] determined in accordance with the law of the jurisdiction in which the proceedings were held . . . " Thus, the lower Court correctly observed, whether Anton was a convicted felon rested upon an interpretation of Florida state law. The lower Court, however, then proceeded to *ignore* the state law which Anton had argued in his brief, including a crucial 1942 Attorney General's Opinion which was dispositive, and went on to apply

a clearly distinguishable case, *United States v. Drayton*, 113 F.3d 1191 (11th Cir. 1997), to the facts of Anton's case, while failing to analyze or understand Florida Statute 948, which is Florida's withholding of adjudication statute. The panel also misconstrued and misapplied a case Anton relied upon, *Page v. State Board of Medical Examiners*, 141 Fla. 48, 193 So. 82 (1940). The panel concluded that because Anton had been "adjudicated guilty" he was automatically a "convicted felon," notwithstanding that Anton had successfully completed his probation, and that more than five years had elapsed, and that Anton's Florida court order placing him on probation had *specifically* stated that Anton could still possess firearms.

As to Anton's second claim on appeal (that he was deprived of his Sixth Amendment right to present a meaningful defense), the panel below simply reiterated its holding in Anton's first claim and then held that since Anton had "no relevant evidence to support [his] defense, the [trial] court may properly bar" an "erroneous interpretation" of a state statute as a defense. In other words, the panel's disposition of Anton's second appellate issue was predicated upon its disposition of Anton's first appellate issue.

As to Anton's third claim on appeal (that the search warrant and supporting affidavit lacked probable cause and was constitutionally defective and was not amenable to the "good faith exception"), the panel held that "Even had the underlying search warrant lacked probable cause, Anton is unable to

avoid application of the good faith exception rule which allows courts to admit evidence obtained by police officers in reasonable reliance upon search warrants ultimately found to be unsupported by probable cause." (App. 86).

Following the panel's decision below Anton timely moved for rehearing and/or rehearing *en banc*, which was denied on December 24, 2008. (App. 33).

REASONS FOR GRANTING THE WRIT

Certiorari review of the Decision below is merited where the Decision conflicts with decisions out of the Fourth Circuit, notably *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991), and *United States v. Shoemaker*, 2 F.3d 53 (4th Cir. 1993), on essentially the same set of facts and issue of law. In reaching its Decision below, the Eleventh Circuit panel failed to be guided by controlling Florida state law, contrary to Title 18 U.S.C. §921(a)(2), and this Court's instruction in *Beechum v. United States*, 114 S.Ct. 1669 (1994), which mandates that "what constitutes a conviction . . . shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." Anton submits that the need to maintain uniformity among and between the Circuit Courts dictates that certiorari review be granted as to the first question presented in this petition.

As to the second question presented herein, certiorari review is merited where the Decision below

improperly expands the scope of the "good faith exception" to the exclusionary rule carved out by this Court in *United States v. Leon*, 468 U.S. 897 (1984). The panel's Decision below turns the "good faith exception" on its head where the law enforcement agent who executed the search warrant was the very same agent who applied for the warrant, and whose sworn application totally lacked probable cause and also contained "deliberately or recklessly false statements" made by that agent. Thus, it was impossible for that agent to have possessed an "objective good faith reliance" upon the facial validity of the warrant where that agent *knew* that the warrant was predicated upon false information and knew that probable cause was lacking. This Court should not countenance a Decision such as the one below which rewards law enforcement officers who knowingly submit misleading and false affidavits to magistrates. Because the *Leon* "good faith exception" was never intended to shield such actions by police officials, this Court should grant the writ as to this question.

ARGUMENT I

DOES THE DECISION BELOW CONFLICT WITH *U.S. v. ESSICK*, 935 F.2d 28 (4th Cir. 1991) AND *U.S. v. SHOEMAKER*, 2 F.3d 53 (4th Cir. 1993), ON ESSENTIALLY THE SAME SET OF FACTS AND ISSUE OF LAW, AND WAS THE PETITIONER THEREBY DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A MEANINGFUL DEFENSE TO HIS JURY?

The panel below initially correctly observed that for purposes of determining whether a person charged with the Federal offense of possession of a firearm by a convicted felon is in fact a "convicted" felon, a court must look to see the law of the jurisdiction in which the alleged conviction occurred. *See Beechum v. United States*, 114 S.Ct. 1669 (1994), citing Title 18 U.S.C. §921(a)(20), (what constitutes a conviction "is determined in accordance with the law of the jurisdiction in which the proceedings were held." From that point, however, the panel's decision took a left turn and the Court simply ignored the controlling state law which Anton presented and argued to both the trial Court and to the Court of Appeals.

The panel below simply ignored Florida Attorney General's Opinion 042-427, dated August 28, 1942, wherein the Attorney General was called upon to answer this question:

> Is a person who has been found guilty of a felony in this state and placed on probation

> with the suspension of imposition of sentence deprived of his civil rights in this state?

In answering in the negative, the Attorney General stated in relevant part that:

> Accordingly, if imposition of sentence be suspended and the defendant is place on probation. the defendant, although found guilty, is not "convicted" and does not, therefore, lose his civil rights under the statutes mentioned above. *Page v. State Board of Medical Examiners*, 141 Fla. 794, 193 So. 82 (1940); *Smith v. State*, 75 Fla. 468, 78 So. 530 (1918).

This Attorney General Opinion has never been overruled or litigated until now. The panel below ignored this Attorney General's Opinion and ignored Anton's assertion that *Page v. State Board of Medical Examiners*, *supra*, was on point and dispositive. Anton's case is controlled by this Attorney General's Opinion, along with *Page* and other Florida cases and statutes. Anton pled *nolo contendere* (not guilty) and was placed on probation for five years pursuant to Florida's "withholding" statute, Section 948.01(2), Florida Statutes. Anton then successfully completed his probation and was then discharged by the Court. Under Florida law, if imposition of sentence be suspended and the defendant is placed on probation and he then successfully completes that probation and is discharged, although he had been adjudicated "guilty," he is not "convicted" and does not, therefore, lose his civil rights under the statutes mentioned above. This is why the order placing Anton on probation

contained a specific "condition of probation" which, at condition number 4, stated:

> (4) You will neither possess, carry or own any weapons or firearms **without first securing the consent of your probation officer**. (App. 10) (emphasis added).

The panel below simply ignored this order and its condition of probation which clearly states that Anton could possess a firearm *if* he obtained the permission of his probation officer. This would not be possible if Anton was truly a "convicted" felon for it would be a violation of state law prohibiting *convicted* felons from possessing firearms. Circuit Judge Osee R. Fagan, who placed Anton on probation, had a true and correct understanding of controlling state law, however, hence this condition of probation.

The panel below also ignored Anton's citation to and reliance upon *United States v. Willis*, 106 F.3d 966 (11th Cir. 1997), which correctly interprets the relevant Florida state law and held that the defendant's prior plea of *nolo contendere* to alleged predicate offense in Florida state court was not a "conviction" under Florida law and thus the defendant could not be convicted of the Federal offense of possession of a firearm by a convicted felon.

Under Florida law, adjudication of guilt may be withheld if the trial judge places the defendant on probation. Section 948.01(1) and (2), Fla.Stat.; *State v. Sylvio*, 846 So.2d 1271 (Fla. 4th DCA 2003). And, a *nolo contendere* plea followed by a withholding of

adjudication is not a conviction. *Cella v. State*, 831 So.2d 716 (Fla. 5th DCA 2002). In *Batchelor v. State*, 729 So.2d 956, 958 (Fla. 1st DCA 1999), the court stated:

> However, a no-contest plea followed by a withhold of Adjudication is not a "conviction." *Garron v. State*, 528 So.2d 353 (Fla.1988). *Accord*, *United States v. Willis*, 106 F.3d 966 (11th Cir. 1997) (interpreting Florida law).

Moreover, a defendant whose adjudication of guilt was withheld and who successfully completes his term of probation is not a "convicted" person. Section 948.06(1), Fla.Stat.; *Cella v. State*, *supra*; *Negron v. State*, 799 So.2d 1126 (Fla. 5th DCA 2001) (prior offense of robbery with a firearm should not have been scored as a "conviction" because defendant had entered a no-contest plea, had adjudication withheld, and successfully completed probation. *See also*, *St. Lawrence v. State*, 785 So.2d 728, 730 (Fla. 5th DCA 2001)). A plea of no *contest* with an adjudication of guilt withheld and with probation successfully completed does not entail a 'determination of guilt,' such offenses should not be included as 'prior record' under the sentencing guidelines." And, in *Thomas v. State*, 356 So.2d 846 (Fla. 4th DCA 1978), the Court wrote:

> Withholding and suspension of adjudication and sentence means the court declines to convict (adjudicate guilty) the defendant or fine or imprison him until probation is tried.

> Withholding or suspending adjudication or sentence in a felony case can only be done when the defendant is put on probation. *If the defendant successfully completes his probation he is not a convicted person* but if the probation is violated the court may then adjudicate and sentence. (Emphasis added).

Furthermore, Florida law specifically provides that a "conviction" requires an adjudication of guilt *either by verdict of a jury or by a plea of guilty*. *State v. Gazda*, 257 So.2d 243-44 (Fla. 1971) ("the term 'conviction' means determination of guilt by verdict of the jury or by a plea of guilty"); *United States v. Thompson*, 756 F.Supp. 1492 (N.D. Fla. 1991). Relevant to this case, a *nolo contendere* plea *does not* constitute a confession of guilt and is not the equivalent of a guilty plea. *Gazda*, *supra*, at 243-44; *Thompson*, *supra*, at 1496. Thus, a *nolo contendere* plea is not a "conviction" under Florida law. In *Thompson*, the U.S. District Court was faced with the same issue presented here. The federal defendant, charged with possession of firearms by a convicted felon, with an alleged Florida predicate felony, filed a motion to dismiss asserting his *nolo contendere* plea in a Florida state court was not a "conviction" under Florida law. Following an exhaustive examination of Florida's relevant case law defining what constitutes a "conviction," the *Thompson* court granted the motion and dismissed the indictment. In doing so the Court, relying partly on *Garron v. State*, *supra*, held that:

> Such reasoning [as set forth in *Garron*] leads this court to conclude that, under Florida law, defendant's *nolo* plea *is not* the equivalent of a guilty plea. If not the equivalent of a guilty plea, the defendant's plea – or the effect thereof – is not governed by *Grinkiewica* and *Orellanes*. Indeed, independent review of Florida law, discussed above, has convinced this court that where, as here, a *nolo* plea is being used as an essential element of another offense, Florida law would not consider such plea to be a "conviction," at least not where the defendant has satisfactorily completed his probationary period. *Thompson*, at 1497 (emphasis in original).

Thompson is another decision which the panel below simply ignored even though Anton relied upon it in his brief. *See also*, *United States v. Willis*, *supra*, (defendant's prior plea of *nolo contendere* to alleged predicate offense in Florida state court was not a "conviction" under Florida law, and thus defendant could not be convicted of federal offense of possession of firearm by convicted felon.) Again, the panel below simply ignored *Willis*.

In its decision the panel below mistakenly relied upon *Weathers v. State*, 56 So.2d 536 (Fla. 1952); but *Weathers* was not appropriate. The defendant, Weathers, argued that his co-defendant was not guilty because the case was under appeal after a jury verdict. Anton was not found guilty by a jury. He did not plead guilty, and his sentence was suspended. The importance of this distinction between a

nolo contendere plea and withholding of a conviction is different from a finding of guilt by a jury or by guilty plea wherein the defendant did not have his judgment suspended.

The panel below also based its holding on *United States v. Drayton*, 113 F.3d 1191 (11th Cir. 1997). *Drayton*, too, is easily distinguishable. First, unlike Anton, the defendant in *Drayton* had *violated his probation* and had then been *sentenced to prison*, leading to the conclusion that he must have been adjudicated guilty. Second, the *Drayton* court was looking to *federal law* (not state law) to determine if that defendant was "convicted." Thus,

> [w]e therefore hold that a *nolo contendere* plea where adjudication is not withheld or where there is subsequently an adjudication of guilt is a conviction under Florida law ***which satisfies the requirement of the Armed Career Criminal statute.*** *Drayton*, at 1193 (emphasis added).

The above emphasized portion clearly distinguishes *Drayton* from Anton's case. In *Drayton*, the court was looking to *federal* law to determine what constituted a "conviction" for purposes of applying a *federal* sentencing statute (the Armed Career Criminal statute, Title 18 U.S.C. §924(e)). Importantly, §924(e) does not require the federal court to look to the state court where the predicate felony was obtained in order to define what constitutes a "conviction." In contrast, in Anton's case where he has been convicted under Title 18 U.S.C. §922(g)(1), that

statute specifically instructs that, in determining what constitutes a "conviction," the court must look to "the law of the jurisdiction in which the proceedings were held," i.e., the law of the State of Florida. Thus, Anton's alleged state "conviction" must "satisfy" the laws of the State of Florida in order to "satisfy §921(a)(20)." *Drayton* itself specifically restricts its holding to cases involving the Armed Career Criminal statute, *id.* at 1193, and cannot be expanded to encompass cases involving what constitutes a conviction under Title 18 U.S.C. §921(a)(20) and §922(g)(1).

Second, the defendant in *Drayton* had violated his probation, while Anton successfully completed his. *See Thomas v. State*, *supra*, ("If the defendant successfully completes his probation he is not a convicted person."). Third, the language in Judge Fagan's order placing Anton on probation which contemplated that Anton *could* possess firearms, indicates that, even if Anton was actually adjudicated "guilty," he was not "a convicted felon" within the meaning of the applicable Florida statutes. In short, the panel below improperly focused on the definition of "guilt" and/or "guilty," when the relevant inquiry was whether Anton was a "convicted felon." Under Florida law, "guilty" and "convicted" are simply not synonymous. This distinction eluded the panel below. Accord, *Page v. State board of Medical Examiners*, *supra*. *See also*, *Clinger v. State*, 533 So.2d 315 (Fla. 5th DCA 1988), at 316:

> Notwithstanding that for some limited purposes (i.e., for purposes of sentencing under the guidelines, under Fla.R.Crim.Proc. 3.701.d.2)

> conviction means a determination of guilt, whether or not adjudication was withheld, *the defendant is not adjudicated guilty and no judgment of conviction is entered against the defendant* when the imposition of sentence is stayed and withheld and the defendant is placed on probation or community control under section 948.01(3), Florida Statutes. (emphasis added).

The decision below also conflicts with *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991), and *United States v. Shoemaker*, 2 F.3d 53 (4th Cir. 1993) on essentially the same facts, creating a conflict between the Fourth Circuit and the Eleventh. In *Essick*, the defendant was charged, just like Anton, with possessing firearms as a convicted felon in violation of Title 18 U.S.C. §922(g)(1). The defendant asserted that he was not a "convicted" felon, as defined by Title 18 U.S.C. §921(a)(20), because, under North Carolina state law, he had automatically had his civil rights restored pursuant to a specific state statute, after five years following his release from prison. Thus, he argued, the federal government was required to do more than simply present proof of his predicate state conviction. Rather, whether he was "convicted" or not was an essential element of the federal crime charged and the federal government was required to *affirmatively* prove the ongoing viability of that conviction, i.e., to prove that he had possessed the firearms within five years of his release

from state prison.[2] Because the government had failed to so prove, the Court of Appeals reversed his conviction. In doing so the court first observed that, "Possession [of a firearm] beyond the five-year post-release period is simply not a crime in North Carolina." *Id.* at 30. In finding that the federal government had failed to carry its burden of proof on an essential element of the crime charged, the court then held that:

> In enacting the Firearm Owners' Protection Act in 1986, Congress clearly empowered each state to determine if ex-felons would be legally permitted under federal law to possess firearms. In effect, each state is able to carve out exemptions to the general federal proscription against possession of *any* ex-felon . . . Proof of a prior "conviction" encompasses more than proof of a discrete event in the defendant's past; the government must show the continuing vitality of the conviction.

Essick, at 31 (emphasis in original). Anton's case is very similar to the defendant in *Essick*. As already demonstrated, *supra*, aspects of Florida Law establish that Anton was not a "convicted" felon after his sentence was withheld and he successfully completed probation. *See*: Attorney General's Opinion 042-427,

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[2] Title 18 U.S.C. § 921(a)(20), holds that "Any conviction . . . for which a person has been pardoned *or has had civil rights restored* shall not be considered a conviction for purposes of this chapter . . . " (emphasis added).

supra, as well as Judge Fagan's order placing Anton on probation. The panel below simply ignored Anton's reliance upon *Essick*.[3] Likewise, in *United States v. Shoemaker*, *supra*, the court reaffirmed *Essick* and held that the federal charge of possession of a firearm by a convicted felon should have been dismissed, where, by operation of North Carolina state law, the defendant's civil rights had been restored after five years following his release from prison.

Because the panel's decision below creates a conflict between the Eleventh Circuit decision below and the decisions in *Essick*, *supra*, and *Shoemaker*, *supra*, this Court should grant certiorari review as to the first question presented in this petition.

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[3] In issue II in his appellate brief, Anton specifically argued that the trial judge's refusal to allow Anton to prove to his jury that he was not "convicted" under Florida law relieved the federal government of its burden of proof to establish all the elements of the crime charged and deprived Anton of his Sixth Amendment right to present a meaningful defense.

ARGUMENT II

DOES THE DECISION BELOW OFFEND THE FOURTH AMENDMENT BY IMPROPERLY EXPANDING THE SCOPE OF *U.S. v. LEON*'S "GOOD FAITH EXCEPTION" TO THE EXCLUSIONARY RULE THE AGENT EXECUTING THE SEARCH WARRANT WAS THE SAME AGENT WHOSE SWORN APPLICATIONS FOR THE WARRANT CONTAINED DELIBERATELY OR RECKLESSLY FALSE STATEMENTS, AND WAS OTHERWISE LACKING IN PROBABLE CAUSE, THUS NEGATING ANY POSSIBILITY THAT THE AGENT POSSESSED AN "OBJECTIVE GOOD FAITH RELIANCE" UPON THE WARRANT BEING FACIALLY VALID?

In his motion to suppress evidence filed in the trial court (App. 57) as well as in his briefs on appeal, Anton argued in detail that the affidavit and search warrant lacked probable cause for three distinct reasons: 1) The affidavit contained insufficient facts and information to establish probable cause that a crime(s) was being committed at the residences and/or that contraband would be found there; 2) the staleness of the information contained in the affidavit failed to establish probable cause; and, 3) the affidavit relied upon "information" supplied by an unnamed confidential informant whose reliability was not established. After the district court denied the motion by holding that "[h]owever, assuming *arguendo* that the search warrant was not supported by probable cause, the evidence seized pursuant to it would not be suppressed anyway since the good faith exception to

the exclusionary rule applies in this case," Anton argued on appeal that this ruling was in error and the good faith exception should not apply to the facts of this case.

In its Decision below the panel devoted less than two pages to this claim, and concluded with the following holding:

> Even had the underlying search warrant lacked probable cause, Anton is unable to avoid the application of the good faith exception to the exclusionary rule which allows courts to admit evidence obtained by police officers in reasonable reliance upon search warrants ultimately found to be unsupported by probable cause. *United States v. Leon*, 468 U.S. 897 (1984). None of the limited exceptions to the good faith exception apply to the warrant in this case as the warrant was not based on reckless information, and the district court reasonably determined that the judge issuing the warrant did not abandon his juridical role. Accordingly, the district court did not err in denying Anton's motion to suppress. (App. 1).

It is the above holding which Anton submits merits this Court's review, because unlike a typical *Leon* – exception case, the law enforcement agent who executed the warrant was the very same agent who submitted the defective affidavit in support of the application for the warrant. Thus, it cannot be said that Special Agent Desmond was ignorant of the very falsehoods she put into her affidavit nor was she

ignorant of the lack of probable cause. The *Leon* good faith exception requires just that, a *good faith belief* by the officer executing the warrant that the warrant was issued based upon probable cause. It was impossible for Agent Desmond to have possessed a "reasonable reliance" upon the warrant being grounded in probable cause when she herself was the one who tainted the process. As will be demonstrated, *infra*, the panel below clearly erred when it held that "none of the limited exceptions to the good faith exception apply to the warrant in this case."

In *United States v. Leon*, *supra*, this Court held evidence admissible that was obtained by police in objective good faith reliance upon a facially valid warrant that was later found to be invalid because of insufficient probable cause. This Court concluded that a "good faith" exception to the exclusionary rule was proper because suppressing evidence obtained pursuant to a warrant that police believed to be lawful would not further the exclusionary rule's goal of deterring official misconduct. *Leon*, 468 U.S., at 918-20, 925-26. Critical to a finding that the *Leon* good faith exception applies is a finding that the police were acting on the objectively reasonable assumption that their conduct did not violate the Fourth Amendment. *Id.* at 918-19. The good faith exception does not extend to cases in which the police have no reasonable grounds to believe the warrant is valid. *Leon*, at 922-23.

This Court has identified four situations in which police reliance on a warrant is not objectively

reasonable: 1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; 2) when the magistrate failed to act in a neutral and detached manner; 3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and, 4) when the warrant was so facially deficient that a reasonable officer could not have believed it to be valid. As he did on appeal below, Anton submits that situations 1 and 3, *supra*, apply here, making police reliance on the warrant not objectively reasonable, and thus the *Leon* good faith exception inapplicable.

First, as he argued below, Anton submits that Agent Desmond lied in her affidavit about her "personal observation and identification" of Anton's "mobile trailer" and his pickup truck. This deception is revealed by her listing of the wrong tag number for the "mobile trailer" she had purportedly observed Anton towing to gun shows, and demonstrates that contrary to her sworn assertions in her affidavit, Agent Desmond actually obtained the tag numbers from public records, *not* from her "personal observation." Agent Desmond found Anton's *boat trailer* tag in the public records (a trailer kept stored out of sight, which Desmond could not have "observed") and erroneously *assumed* it was the tag number for the "mobile trailer," and so she listed that tag number in her affidavit, falsely claiming it was based upon her "personal observations." Likewise, her listing of the tag number of Anton's pickup truck, a tag which had

expired (unknown to Agent Desmond) and was no longer in use. These "deliberately or recklessly false" statements, made by the police affiant herself who then executed the warrant, make it impossible to find her reliance on the warrant to be "objectively reasonable."

This information, regarding Anton's alleged use of this "mobile trailer" to tow his alleged firearms between his home and various gun shows, was material and essential to the magistrate's finding of probable cause that firearms would be found in Anton's residences. Accordingly, situation 1 does exist in this case and the panel below erred in holding that "none of the limited exceptions to the good faith exception apply to the warrant in this case as the warrant was not based on reckless information . . . ," and erred in holding that consequently the *Leon* good faith exception was applicable. *See Franks v. Delaware*, 438 U.S. 154, at 156 (1978); *United States v. Novaton*, 271 F.3d 968, 987 (11th Cir. 2001) (preliminary showing made, pursuant to *Franks*, when officer misrepresented facts in affidavit).

A fair reading of Agent Desmond's affidavit shows that it contains absolutely no factual information, evidence or even allegations that anybody, at any time, ever saw any firearms at either of Anton's residences; the affidavit is devoid of facts, information or evidence suggesting that a crime was being committed at either residence or that contraband would be found there. Paragraph 29 (page 11) of the

affidavit provides the *entire* basis for the justification for the warrant:

> 29. Based upon your affiant's past experience and training as a Special Agent with ATF your affiant knows that convicted felons and dealers of firearms, who possess firearms, commonly maintain firearms, ammunition, sales receipts and other documents related to the ownership of said firearms and ammunition in their residences. These receipts may be evidence of a "straw purchaser" who bought firearms from a licensed dealer for the convicted felon, or may be typewritten or handwritten receipts to or from individual buyers or sellers. Additionally, your affiant knows that convicted felons who possess firearms (and indeed anyone who possessed firearms) commonly store firearms and ammunition for those firearms in their residences or other secure areas on their property.

This is a blatantly generic statement of nothing more than rank, boilerplate speculation of the most self-serving nature attempting to disguise itself as an "expert opinion." Rather than being predicated on factual *particulars* relating to this *specific* case, this statement employs circular logic and is hoisted by its own bootstraps. By simply changing the crime this statement could be used as justification to search anybody's residence (e.g., "a burglar commonly stores his stolen goods at his home, ergo we automatically have probable cause to search his residence;" "a drug

dealer commonly keeps his drugs in his home, ergo we automatically have probable cause to search his residence."). Under this self-executing logic, once a person becomes a suspect, he automatically forfeits his Fourth Amendment rights. Such rank speculation simply does not rise to the level of probable cause as defined by this court in *Ornelas v. United States*, 517 U.S. 690 (1996) and *Illinois v. Gates*, 462 U.S. 213 (1983), and fails to meet the "warrant requirement" set forth in *Katz v. United States*, 389 U.S. 347, 357 (1967).

Katz and its progeny hold that, to satisfy the warrant requirement, an impartial judicial officer must assess whether the police have probable cause to conduct *the* search, and the "evidence" contained in the affidavit must provide the magistrate with a "substantial basis" for the probable cause determination. *Gates*, *supra*, 462 U.S. at 238-39. Where the affidavit is lacking in sufficient details and information, or is simply based upon a "hunch" by police, the impartial judicial officer cannot fairly determine that probable cause exists. *See*, *e.g.*, *United States v. Johnson*, 256 F.3d 895, 905-06 (9th Cir. 2001) (no probable cause to search property for suspect because officer's "gut feeling" that suspect would be on property was insufficient without facts to support hunch); *Aguilar v. Texas*, 378 U.S. 108 (1964) (magistrate could not make independent assessment of probable cause when officers stated only that they "received reliable information from a credible person and do believe" narcotics are stored in defendant's home);

Giordenello v. United States, 357 U.S. 480, 486 (1958) (magistrate could not make independent assessment of probable cause because "complaint contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein . . . and did not set forth other sufficient basis upon which a finding of probable cause could be made"). Here, there existed no "substantial basis" for the magistrate to find that probable cause existed, and Agent Desmond knew this since she was the one who submitted the defective affidavit.

Moreover, Agent Desmond's blanket, generic assertion in paragraph 29 of the affidavit violates the well-established principle that a magistrate's decision to issue a warrant may not be based on *per se* rules regarding probable cause. *United States v. Khounsavanh*, 113 F.3d 279, 285 (1st Cir. 1997) (each case must be judged on its own facts; purchase of controlled substance observed by officer does not provide *per se* probable cause, noting a *per se* rule is not appropriate in the context of protecting precious Fourth Amendment freedoms.); *Technical Ordinance, Inc. v. United States*, 244 F.3d 641, 647 (8th Cir. 2001) (probable cause not determined according to fixed and rigid formula, but rather in light of totality of circumstances known to magistrate). Agent Desmond's blanket statement that all convicted felons suspected of possessing firearms will commonly store those firearms in their residence and/or vehicle constitutes an impermissible *per se* rule, and it was error for the magistrate to rely upon such to find probable cause.

Based upon the foregoing it is clear that situation number 3 exists here and the warrant "was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Accordingly, the *Leon* "good faith exception" does not apply here and the lower courts erred in holding that it did. For this reason, certiorari review is merited on this issue.

CONCLUSION

WHEREFORE, based upon the foregoing facts and arguments, Anton submits that this Court should grant certiorari review on the two questions presented herein.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13124

D.C. Docket No. 06-00029-CR-1-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER ANTHONY ANTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(October 30, 2008)

Before BARKETT and WILSON, Circuit Judges, and GOLDBERG,* Judge.

GOLDBERG, Judge:

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

Peter Anton appeals his conviction for possession of a firearm by a convicted felon in violation of Title 18 U.S.C. § 922(g)(1) (2000). He first contends that the district court erred in denying his motion to dismiss the indictment because he is not a convicted felon. Anton further argues that his constitutional rights under the Fifth and Sixth Amendments were violated by various district court decisions. Anton also contends that the district court erroneously failed to grant his motion to suppress the evidence seized in the search of his residence because the warrant was not supported by probable cause. Lastly, Anton objects to the calculation of his sentencing range; specifically arguing that the district court erred: (1) in calculating his base offense level by holding him, without supporting evidence, responsible for over 200 firearms and a stolen firearm; (2) in finding that his firearms were not possessed for sporting or collection purposes; and (3) in failing to grant him a two-level reduction for timely acceptance of guilt. For the following reasons, we affirm Anton's conviction, but vacate and remand for resentencing.

I. DISCUSSION

A. Anton's Status as a Convicted Felon

Anton first argues that the district court erred in concluding that his 1989 plea of nolo contendre to one count of grand theft was a felony conviction. This argument is meritless. "What constitutes a conviction . . . [is] determined in accordance with the law of the

jurisdiction in which the proceedings were held. . . ." 18 U.S.C. § 921(a)(2). Under Florida law, a "'conviction' means adjudication of guilt irrespective of the sentence." *Weathers v. State,* 56 So. 2d 536, 538 (Fla. 1952). The Florida Statutes further provide that:

> [i]f it appears likely to the court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and in either case, it shall stay and withhold the imposition of sentence upon such defendant and place the defendant upon probation.

Fla. Stat. ch. 948.01(2).

We review questions of statutory interpretation *de novo. United States v. Johnson,* 399 F.3d 1297, 1298 (11th Cir. 2005). Under Florida Statute 948.01(2), the district court has the discretionary authority to withhold the adjudication of guilt. *Sanchez v. State,* 541 So. 2d 1140, 1141 (Fla. 1989). This decision is of vital importance as a plea of nolo contendre is not a felony conviction if the adjudication of guilt has been withheld. *United States v. Willis,* 106 F.3d 966, 967-68 (11th Cir. 1997). However, "a nolo contendre plea where adjudication is not withheld or where there is subsequently an adjudication of guilt

is a conviction. . . ." *United States v. Drayton,* 113 F.3d 1191, 1193 (11th Cir. 1997). In arguing his motion to dismiss, Anton conceded that he had been adjudicated guilty. Anton now cites several cases in support of his argument that an individual given a suspended sentence is not a convicted felon upon completion of the probationary term. *See, e.g., Page v. State Bd. of Med. Exam'rs,* 141 Fla. 294, 193 So. 82 (1940); *Smith v. State,* 75 Fla. 468, 78 So. 530 (1918). However, none of these cases involved an adjudication of guilt and therefore are inapposite. As the district judge adjudicated Anton's guilt in its 1989 order, Anton's nolo contendre plea is a conviction under Florida law. Accordingly, the district court did not err in concluding that Anton was a convicted felon for the purposes of § 922(g).

B. Anton's Affirmative Defenses

Anton argues next that the district court violated his Sixth Amendment right to present a meaningful defense, and the Fifth Amendment requirement which places the burden of proving all elements of an offense upon the prosecution. We review constitutional claims *de novo. United States v. Nash,* 438 F.3d 1302, 1304 (11th Cir. 2006). Anton argues that the district court erred in barring Anton from presenting evidence that his civil rights were restored after his probationary period expired, and that his nolo contendre plea was not a criminal conviction. However, these arguments are meritless. Anton's restoration of rights argument was based upon his erroneous

interpretation of Florida Statute 948.01(2) as having restored his civil rights upon his completion of the probationary period. As previously discussed, Anton's 1989 nolo contendre plea was a felony conviction. No other evidence demonstrating that his civil rights had been restored was presented. If a defendant offers no relevant evidence to support a defense, the court may properly bar its presentation at trial. *United States v. Thompson,* 25 F.3d 1558, 1560 (11th Cir. 1994). Accordingly, the district court did not err in barring this argument.

As far as his status as a convicted felon, the district court correctly concluded that this involved a question of law, rather than a question of fact for the jury. *Willis,* 106 F.3d at 967. Further, the district court did not engage in improper burden shifting because, had the case proceeded to trial, the government would still have been required to present evidence establishing Anton's conviction. The district court's ruling merely determined what constituted a criminal conviction as a matter of law, a legal finding to which the jury would then have applied to the facts of the case at trial. As such, the district court did not err in barring this defense, or engaging in improper burden shifting.

C. Anton's Motion to Suppress

Anton also argues that the district court erred in denying his motion to suppress the evidence obtained in the search of his residence – claiming that the

warrant lacked sufficient facts to establish probable cause. The Court reviews denials of motions to suppress under a mixed standard of review – "reviewing the district court's findings of fact for clear error and its application of law to those facts *de novo*." *United States v. Lyons,* 403 F.3d 1248, 1250 (11th Cir. 2005).

Generally, probable cause exists to support a search warrant when the totality of the circumstances indicates that there is a fair probability of discovering contraband. *United States v. Brunbridge,* 170 F.3d 1350, 1352 (11th Cir. 1999). Evidence that the defendant is in possession of contraband that is of the type that would normally expect to be hidden at their residence will support a search. *United States v. Jenkins,* 901 F.2d 1075, 1080 (11th Cir. 1990). Here, the warrant was supported by probable cause. According to the supporting affidavit, federal agents observed Anton with firearms at several gun shows. A confidential informant also indicated that Anton would attend a specific gun show and had claimed to be in possession of over 300 firearms. The affidavit further noted that based upon the federal agent's experience, convicted felons and firearms dealers possessing contraband typically store these items on their property. Based on these statements and the fact that Anton's trailer was observed at multiple gun shows, the totality of the evidence provided probable cause to support the search of Anton's residence. Anton also argued that the warrant was based on stale information. However, staleness did not impact this warrant's validity. Anton was observed at several

gun shows in 2005; observations that are substantially contemporaneous with the search of his property in late 2005.

Even had the underlying search warrant lacked probable cause, Anton is unable to avoid the application of the good faith exception to the exclusionary rule which allows courts to admit evidence obtained by police officers in reasonable reliance upon search warrants ultimately found to be unsupported by probable cause. *United States v. Leon,* 468 U.S. 897 (1984). None of the limited exceptions to the good faith exception apply to the warrant in this case as the warrant was not based on reckless information, and the district court reasonably determined that the judge issuing the warrant did not abandon his judicial role. Accordingly, the district court did not err in denying Anton's motion to suppress.

D. Anton's Sentencing Objections

Lastly, Anton objects to several aspects of his sentence. Anton argues that the district court erroneously accepted Probation's offense level calculation, which was not supported by evidence in the record. Anton also argues that the district court erred in finding that his firearms were not possessed for sporting or collection purposes, and that he was not entitled to a two level reduction for timely acceptance of guilt. The Court reviews the district court's findings of fact for clear error and its application of the sentencing guidelines to those facts *de novo. See*

United States v. Humber, 255 F.3d 1308, 1311 (11th Cir. 2001).

Anton's first sentencing argument is that no evidence was introduced to support the conclusions that he was responsible for over 300 firearms and a stolen firearm. As far as the quantity of firearms, the government primarily relied on various documents seized at Anton's property. None of these documents were made part of the record before the district court at sentencing. The only other evidence related to the number of firearms were the hearsay statements of the confidential informant. However, to rely on hearsay statements at sentencing, the district court must make explicit findings as to the credibility and reliability of these statements. *See United States v. Baker*, 432 F.3d 1189, 1253-55 (11th Cir. 2005). Here the district court failed to make any findings regarding these hearsay statements. Similarly, the government failed to present any evidence to establish that one of Anton's firearms was stolen. Accordingly, the district court committed clear error by improperly calculating Anton's sentencing range based upon unsupported conclusions. *See, e.g., United States v. Wise*, 881 F.2d 970 (11th Cir. 1989).

Anton's additional sentencing arguments, however, are meritless. Anton had the burden of producing evidence to establish that his firearms were for sporting or collection purposes, and failed to present any evidence in support of this point. *See United States v. Caldwell*, 431 F.3d 795, 799 (11th Cir. 2005). Similarly, Anton had the burden of establishing that

he was entitled to a reduction for timely acceptance of responsibility, and failed to present any evidence that he had taken responsibility for his offense other than pointing to his conditional guilty plea. *See United States v. Sawyer,* 180 F.3d 1319, 1323 (11th Cir. 1999). In fact, Anton continued to deny responsibility for more than the thirteen firearms listed in the plea agreement when it is obvious he possessed some quantity of additional firearms.

II. CONCLUSION

Accordingly, we AFFIRM with respect to Anton's conviction, but VACATE and REMAND for resentencing.

JUDGEMENT OF GUILT AND
PLACING DEFENDANT ON PROBATION

STATE OF FLORIDA — In The Circuit Court
- vs - Plaintiff — of Levy County, Florida
Peter Anton — Case No. 88-387CF
Defendant

This cause coming on this day to be heard before me, and you,
the defendant Peter Anton
being now present before me, and you

having: ENTERED A PLEA OF NOLO CONTENDERE TO

the offense of Count I – Grand Theft

The court hereby adjudges you to be guilty of said offense; and

It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law.

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld, and that you be placed on probation for a period of Five (5) years under the supervision of the Department of Corrections and its Officers, such supervision to be subject to the provisions of the laws of this State.

It is further ordered that you shall comply with the following conditions of probation

(1) Not later than the fifth day of each month, you will make full and truthful report to your Probation Officer on the form provided for that purpose.

(2) You will pay to the State of Florida the amount of Thirty Dollars ($30) per month toward the cost of your supervision unless otherwise waived in compliance with Florida Statutes.

(3) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Probation Officer.

(4) **You will neither possess, carry or own any weapons or firearm without first securing the consent of your Probation Officer.** [Emphasis added.]

(5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.

(6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

(7) You will work diligently at a lawful occupation and support any dependants to the best of your ability, as directed by your Probation Officer.

(8) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you.

****CONDITIONS OF PROBATION CONTINUED ON REVERSE SIDE****

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation, adjudge you guilty and impose any sentence which it might have imposed before placing you on probation.

It is further ordered that when you have reported to the Probation Officer and have been instructed as to the conditions of probation you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT, this the 20th day of March, 1989

[SEAL] /s/ Osee R. Fagan
Osee R. Fagan, Judge

I acknowledge receipt of a certified copy of this order and that the conditions have been explained to me.

Date: _____ _____
Probationer

Instructed by: _____
Original: Court
Copies: Probationer
File

(9) You will pay $225.00 for statutory court costs through and as directed by your Probation Officer.

(10) The Court reserves the right to impose a restitution requirement following a hearing or stipulation of counsel.

[Fingerprints Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES
OF AMERICA

v.

PETER A. ANTON,
EDNA A. ANTON,

Defendant.
_____/

CASE NO.
1:06-cr-00029-MP-AK

ORDER

This matter is before the Court on Doc. 65, Motion to Dismiss for Lack of Jurisdiction, filed by Defendant Peter Anton. The Government has filed a Response in Opposition to Defendant Peter Anton's motion. Doc. 66. An evidentiary hearing was held on Wednesday, February 14, 2007. At the hearing, Defendant Edna Anton adopted her co-defendant's Motion to Dismiss. For the following reasons, the Motion to Dismiss is denied.

In his Motion to Dismiss, Defendant Peter Anton contends that he is not a convicted felon under Florida law or under Title 18 U.S.C. § 922(g)(1) or 924(a)(2), and therefore he has committed no offense against the United States of America, thus depriving the Court of jurisdiction. Section 922(g)(1) provides that it shall be unlawful for a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to

receive any firearm which has been shipped or transported in interstate commerce. What constitutes a felony conviction is "determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 922(a)(20). Since the predicate offense in the instant case is Defendant Peter Anton's plea of nolo contendere entered to one count of Grand Theft in the Eighth Judicial Circuit, in and for Levy County, Florida, the law of Florida supplies the meaning of the term "conviction."

The Florida Supreme Court has declared that "the term 'conviction' means determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court." *State v. Gazda,* 257 So.2d 242, 243-244 (Fla. 1971). However, because a plea of *nolo contendere* is not confession of guilt, where adjudication of guilt is withheld, it cannot be considered a "conviction" under Florida law. *Garron v. State,* 528 So.2d 353, 360 (Fla. 1988). Whereas a guilty plea admits the fact of guilt, a *nolo contendere* plea simply does not contest the charges – it does not serve as an admission. In reviewing Florida law, the Eleventh Circuit stated that "a conviction under Florida law requires either an adjudication of guilt or a guilty plea. . . . [And] a *nolo contendere* plea is 'not the equivalent of a guilty plea.'" *United States of America v. Willis,* 106 F.3d. 966, 969 (11th Cir.1997). However, the Eleventh Circuit has distinguished *Willis,* stating that "the holding in *Willis* would not control a plea of *nolo contendere* followed with an adjudication of guilt, a procedure also permitted the

trial court under Florida law." *United States v. Drayton,* 113 F.3d 1191 (11th Cir. 1997).

Defendant argues that *Drayton* is inapposite, and limited to its facts. In *Drayton,* the defendant was convicted in federal court of possession of a firearm by convicted felon under 18 U.S.C. § 922(g)(1), and was sentenced as armed career criminal pursuant to 18 U.S.C. § 924(e). The issue in *Drayton* was whether a plea of *nolo contendere* followed with an adjudication of guilt could be counted as a prior conviction for purposes of the Armed Career Criminal statute. As in the instant case, the defendant in *Drayton* cited *Willis* for the proposition that a *nolo contendere* plea is not a conviction under Florida law. The Eleventh Circuit clarified the issue, stating that the holding of *Willis* indicates that a Florida *nolo contendere* plea with an adjudication of guilt is a conviction:

> In *Willis,* we held that Willis had not been "convicted" of a felony under Florida law because he "pleaded nolo contendere . . . *and adjudication of guilt was withheld.*" We therefore hold that a *nolo contendere* plea where adjudication is not withheld or where there is subsequently an adjudication of guilt is a conviction under Florida law.

Id. at 1193 (internal citation omitted). Rather than limit its decision to the issue of sentencing under the Armed Career Criminal statute, the court in *Drayton* dealt with the larger issue of defining the term "conviction" under Florida law, finding that *Willis* itself indicates that "a Florida *nolo contendere* plea *with* an

adjudication of guilt is a conviction." *Id.* For Defendant to argue that *Willis* controls the instant case and *Drayton* does not misses the mark, for the Eleventh Circuit read *Willis* as stating that a *nolo contendere* plea followed with an adjudication of guilt constitutes a conviction under Florida law.

In the instant case, the judgment entered against Defendant Peter Anton states: "The court hereby adjudges you to be guilty of said offense." This is a *nolo contendere* plea followed with an adjudication of guilt – a conviction. However, the judgment withheld imposition of the sentence, conditioned on Defendant's completion of probation. Defendant Peter Anton places great emphasis on the fact that imposition of the sentence was withheld, arguing that without a sentence a conviction cannot exist. Whether a sentence was imposed has no relevancy whatsoever as to whether Defendant Anton was convicted. The Florida Supreme Court has said:

> Our present thought is that one is convicted when the jury returns a verdict of guilty and the judge clinches the finding by adjudicating the guilt though the prisoner may never be punished. How can it be logically said that a man is innocent because he has never been punished? The finding by jury and adjudication by court settle the fact of guilt; the punishment when meted out is simply the penalty for established misconduct.

Weathers v. State, 56 So.2d 536, 538 (Fla. 1952). Therefore, according to the court, "'conviction' . . .

means adjudication of guilt irrespective of sentence." *Id.* Thus, the fact that the imposition of Defendant's sentence was withheld is of little weight. Nor does the fact that Defendant Anton successfully completed probation somehow erase the prior adjudication of guilt. Defendant Anton chose not to contest the charges against him, and the state court, after determining that a factual basis for the plea existed, adjudged Defendant to be guilty of the charges, thereby convicting him of the offense. This conviction supplies the basis for the offense charged in the indictment. Therefore, the Court has jurisdiction. Accordingly, it is hereby

ORDERED AND ADJUDGED:

Defendant Peter Anton's Motion to Dismiss for Lack of Jurisdiction, Doc. 65, is denied.

DONE AND ORDERED this *14th* day of February, 2007

s/Maurice M. Paul
Maurice M. Paul, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES
OF AMERICA

v.

CASE NO.
1:06-cr-00029-MP-AK

PETER A. ANTON,
EDNA A. ANTON,

Defendant. /

ORDER

This matter is before the Court on Doc. 58, Motion to Suppress Evidence Seized Pursuant to Executed Search Warrant, filed by Defendant Peter Anton, and Doc. 71, Motion to Sever Defendant, filed by Defendant Edna Anton. The Government has filed a Response in Opposition to Defendant Peter Anton's Motion to Suppress. Doc. 64. An evidentiary hearing on these motions was held on Wednesday, February 14, 2007. At the hearing, Defendant Edna Anton adopted her co-defendant's Motion to Suppress. For the following reasons, the Motion to Suppress is denied, and the Motion to Sever is granted.

I. Motion to Suppress

On December 27, 2005, Magistrate Judge Allan Kornblum issued a one-page search warrant authorizing Special Agent Shannon B. Desmond of the Bureau of Alcohol, Tobacco, Firearms, and Explosives

("ATF") to search two residences and vehicles owned by Defendant Peter Anton. The warrant also authorized the seizure of "[f]irearms, ammunition and firearms and ammunition receipts." The application for the warrant by Special Agent Desmond was supported by a thirteen-page affidavit, and nine pages of attachments. Special Agent Desmond's affidavit alleges that four months prior to the issuance of the search warrant, Defendant Peter Anton had been seen handling and selling firearms at various gun shows between July 2, 2005, and August 15, 2005. Some of this information comes from an unnamed confidential informant, while other information was provided by ATF Special Agents.

Defendant Peter Anton contends that the "affidavit is completely devoid of any facts, information or evidence suggesting that there was a crime(s) being committed at either of these two residences, much less any probable cause to believe that a crime(s) was being committed at these residences." Doc. 58 at 7. Defendant states that the affidavit does not contain any factual information or allegations that firearms were ever seen at either of Peter Anton's two residences, and that facts supporting the affidavit were stale. Focusing on paragraph 29 of Special Agent Desmond's affidavit, Defendant argues that the affiant's past experience and training as a Special Agent with ATF is insufficient to establish probable cause to search his residences; specifically, the experience "that convicted felons and dealers of firearms, who possess firearms, commonly maintain

firearms, ammunition, sales receipts and other documents related to the ownership of said firearms and ammunition in their residences." Also, Defendant takes issue with the time stamps on the application for the search warrant and the issuance of the search warrant, arguing that Magistrate Kornblum only spent nine minutes to read the twenty-three page application, and implying that he wholly abandoned his judicial role and merely rubber-stamped the application.

Finally, Defendant argues that the vehicles described in Special Agent Desmond's affidavit are identified by the wrong license plate numbers. The tag number listed for the Tailgator mobile trailer, which the affidavit alleges was used by Defendant Anton to transport firearms to and from gun shows, is actually a license tag attached to a 1980 boat trailer. Because Defendant alleges that this boat trailer was always stored in a building, out of sight from the street and out of public view, he contends that the "information produced to the Magistrate was the result of a fictional account and acquired through public records." Also, because the tag number for the 1995 Dodge truck had expired and was no longer in use at the time of the application for a search warrant, Defendant argues for the same inference that the information in the affidavit was fabricated.

In response, the Government states that many of the allegations Defendant raises concerning the warrant's specificity regarding the description of the places to be searched are rebutted by the fact that

attachments to the warrant more fully identified the residences and vehicles, and that Special Agent Desmond had personal knowledge as to the locations to be searched. Further, the Government points out that the information provided by the confidential informant was verified by law enforcement, and therefore serves as a competent, reliable source for the affiant. The Government contends that combined with the independent investigation by law enforcement officers, this information established probable cause that firearms would be found in Defendant's homes and vehicles.

Finally, the Government takes issue with the suggestion that Magistrate Judge Kornblum abandoned his judicial role by signing the search warrant within nine minutes of the filing of the warrant. The warrant shows that the Magistrate signed the warrant at 4:10 p.m. on December 27, 2005, and the time stamp at the Clerk's Office reflects a filing time of 4:01 p.m. The Government's position is that the time stamps Defendant relies on must be inaccurate, since a warrant is filed with the Clerk only after the warrant has been signed and approved by the Magistrate. Because the Government provided the Magistrate with a faxed copy of the affidavit some period of time prior to the presentation of the agent before the Court, the Government argues that issue of time stamps is misplaced anyway, as the Magistrate had adequate time to review the affidavit.

The central arguments raised in Defendant's motion to suppress on the basis of the lack of probable

cause are the unreliability of the confidential informant, the staleness of information, and insufficiency of the facts. Search warrants must be supported by probable cause to satisfy the dictates of the Fourth Amendment. *United States v. Harris,* 403 U.S. 573, 577, 91 S.Ct. 2075, 2079, 29 L.Ed.2d 723 (1971). The probable cause standard is a "practical, nontechnical conception." *Illinois v. Gates,* 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States,* 338 U.S. 160, 176 (1949)).

In reviewing Defendant Peter Anton's charge that the affidavit is not supported by sufficient facts to establish probable cause, only the information presented to the magistrate who issued the warrant may be considered. "Probable cause to support a search warrant exists when the totality of the circumstances allow a conclusion that there is a fair probability of finding contraband or evidence at a particular location." *United States v. Brundidge,* 170 F.3d 1350, 1352 (11th Cir. 1999) (citation omitted). Specifically, Defendant argues that the search of his residences and vehicles was not supported by probable cause because no facts exists that firearms were ever seen at either location. In her affidavit, Special Agent Desmond states that the same trailer that Defendant used to transport firearms to gun shows, and in which forty-six firearms and twenty rounds of ammunition were seized on November 19, 2000, was seen by ATF Special Agents at gun shows where Defendant was observed in possession of firearms. Special Agent Desmond herself personally observed

this trailer parked next to a large out building on Defendant's property, and in her professional experience, she "knows that convicted felons who possess firearms . . . commonly store firearms and ammunition for those firearms in their residences or other secure areas on their property." Desmond Affidavit, Para 29. Further, Defendant told Special Agent Barborini that he currently had three hundred and forty-seven guns, and Defendant told Special Agent Neal that he sold firearms to other dealers. The totality of the circumstances establish probable cause – Defendant traveled to gun shows towing the same trailer he had used previously to transport firearms to gun shows, this trailer was observed parked next to a large out building on Defendant's residential property, Defendant admitted that he owned hundreds of firearms, Defendant admitted that he sold firearms, Defendant was seen handling firearms at his sales table at gun shows, and a firearm that was in Defendant Edna Anton's possession at her residence was allegedly sold by Defendant Peter Anton at a gun show. Based on the affidavit of Special Agent Desmond, the Magistrate had ample information to conclude that a reasonable probability existed that firearms, ammunition, and receipts would be found at the areas described in the search warrant. Therefore, the affidavit is supported by sufficient facts to establish probable cause.

The same analysis applies to the issue of the confidential informant's reliability. In *Gates,* the Supreme Court adopted the "totality of the circumstances"

test for determining whether an informant's tip established probable cause. *Gates*, 462 U.S. at 238. Two factors are key to this analysis: the informant's "veracity" or "reliability" and his or her "basis of knowledge." In evaluating whether an informant's tip establishes probable cause, the degree to which the report is corroborated is an important consideration. When there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant. *See United* 971 F.2d 452, 457 (10th Cir. 1992). In this ease, the confidential informant had provided reliable and verifiable information in the past, and the basis for the knowledge that Defendant sold firearms at gun shows was through the confidential informant's personal observation of the Defendant at these gun shows. The confidential informant accurately predicated that Defendant would attend the gun show in Melbourne, Florida, on July 16, 2005, and Defendant's statement that he had more than three hundred firearms was independently corroborated by ATF Special Agents. Therefore, under the totality of the circumstances, the confidential informant's information sufficed to establish probable cause.

Defendant also asserts that the information supporting Special Agent Desmond's affidavit was stale. and therefore could not establish probable cause to support the issuance of the search warrant on December 27, 2005. Specifically, the information in Agent Desmond's affidavit that Peter Anton's wife, Edna Anton, may have been in possession of certain

firearms at her house between August 9, 2004, and November 23, 2004, and that Defendant Peter Anton had been seen handling and/or selling these firearms at certain public gun shows between July 5, 2005, and August 15, 2005, The issue is whether these alleged facts were so distantly removed in time from the date of the issuance and execution of the search warrant as to render the information stale and the warrant invalid.

With regards to staleness, the Eleventh Circuit has defined stale search warrants as "warrants that, when issued, were based on information too old to create a sufficient probability that the items sought were still at the location to be searched. In other words, the passage of time made it more likely that the circumstances upon which the warrant was issued had changed, thus dissipating probable cause." *United States v. Santa,* 236 F.3d 662, 672 n. 15 (11th Cir. 2000). Courts have held that "the information supporting the government's application for a warrant must show that probable cause exists *at the time the warrant issues.*" *United States v. Bervaldi,* 226 F.3d 1256, 1264 (11th Cir. 2000) (emphasis added). "There is no particular rule or time limit for when information becomes stale." *Id.* at 1265. Rather, "staleness is an issue which must be decided on the peculiar facts of each case." *United States v. Bascaro,* 742 F.2d 1335, 1345 (11th Cir. 1984) (quoting *United States v. Hyde,* 574 F.2d 856, 865 (11th Cir. 1978)). However, there are factors that serve as guidance in this area:

> In addition to the length of time, courts should consider the 'nature of the suspected crime (discrete crimes or ongoing conspiracy), habits of the accused, character of the items sought, and nature and function of the premises to be searched.' For example, the former Fifth Circuit held that four-month-old reports of projectiles in the walls and floors of a dwelling as a result of the test-firing of the murder weapon were not stale because the 'floors and walls of a house are relatively permanent fixtures and would not likely be subject to removal over the period of four months.'

Bervaldi, 226 F.3d at 1264 (internal citations and footnotes omitted). In considering the nature of the crime, courts have "distinguished between criminal activity which is protracted and continuous and that which is isolated." *Id.* For instance, "where an affidavit recites a mere isolated violation then it is not unreasonable to believe that probable cause quickly dwindles with the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance." *Id.* (quoting *Bascaro,* 742 F.2d at 1345-1346).

The evidence reflects that Defendant had been engaged in a continuous pattern of traveling to various gun shows throughout Florida, at which he was observed allegedly handling or selling firearms. One of the firearms transferred to Defendant Edna Anton on August 9, 2004, which she claims were stored at one of the residences searched, was allegedly sold by

Defendant Peter Anton on July 2, 2005, at the South Florida Fair Grounds gun show. Taking into account the number of firearms the confidential informant and Special Agent heard Defendant claim to own, coupled with Defendant allegedly selling these firearms at gun shows, the information supporting the affidavit was not stale, as there was a sufficient probability that the items sought were still at the location to be searched.

However, assuming *arguendo* that the search warrant was not supported by probable cause, the evidence seized pursuant to it would not be suppressed anyway since the good-faith exception to the exclusionary rule applies in this case. The executing officer acted with an objective good-faith belief that the warrant was properly issued by a neutral magistrate. *See United States v. Leon,* 468 U.S. 897, 920-24, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Although Defendant asserts that the Magistrate wholly abandoned his judicial role by only spending nine minutes on a twenty-three page search warrant application, even assuming that the time stamps are correct, the Government provided the Magistrate with a copy of the application prior to its formal presentation, which allowed the Magistrate to fully review the application. The handwritten annotations to the search warrant by the Magistrate belie any contention that the Magistrate merely rubber-stamped the application. The false information the Defendant contends misled the Magistrate is that the license plate numbers described in the affidavit could not have been

observed by the affiant, as the vehicles were out of public view, and therefore the affiant was lying. Since Defendant's trailer and pick-up truck were observed at gun shows by law enforcement, and described beyond their license plates in the application, the Magistrate was not misled even if the license plate numbers were incorrect. Finally, as explained previously, the warrant is not facially deficient or so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable. Therefore, the good-faith exception applies to this case, and the motion to suppress is denied.

II. Motion to Sever

At the hearing, the Court also heard Defendant Edna Anton's Motion to Sever. A district court may sever the trial of co-defendants whenever it appears that a defendant would be prejudiced by joint trial with a co-defendant. Fed. R. Crim. P. 14. Generally, there is "a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States,* 506 U.S. 534, 537, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993). Because one defendant may not compel another defendant to testify in a joint trial, and because of the tactical reasons a defendant would elect not to take the stand to offer favorable testimony for his or her co-defendant during a joint trial, exculpatory testimony is a standard reason for severance. However, the defendant moving for severance on the basis of exculpatory testimony has the burden to" demonstrate that a joint trial will result in

specific and compelling prejudice to the conduct of his defense." *United States v. Schlei,* 122 F.3d 944, 984 (11th Cir. 1997).

A defendant arguing for severance on the ground that it will permit the exculpatory testimony of a co-defendant "must show: (1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial." *United States v. Machado,* 804 F.2d 1537, 1544 (11th Cir. 1986). If the defendant makes such showing, the district court must then "(1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion." *Id.* It is within the discretion of the district court as to whether severance is required, although this discretion is considered abused when severance is denied despite demonstrated prejudice to the defendant's ability to present adequate evidence in his or her own defense. *See United States v. Cobb,* 185 F.3d 1193, 1198. (11th Cir. 1999).

The primary issue in considering severance on the basis of exculpatory evidence is the testifying defendant's waiver of Fifth Amendment rights. Because criminal defendants cannot be compelled to testify as witnesses against themselves, they must voluntary agree to take the stand. This issue is

usually addressed by the testifying defendant understanding that he might waive his Fifth Amendment right against self-incrimination should severance be granted, and still agreeing to testify. In addressing this concern, the Court's inquiry "with whether a co-defendant will testify for the defendant in a separate trial is limited to determining whether the co-defendant is likely to testify, not whether he is certain to do so." *Id.* at 1200. See *also Taylor v. Singletary,* 122 F.3d 1390, 1393 (11th Cir.1997). At the hearing, Defendant Peter Anton, after being informed by counsel and the Court of the possible consequences and ramifications of testifying, agreed to testify at the trial of his co-defendant, Edna Anton. The Court finds that Edna Anton has made the requisite showing that her co-defendant is likely to testify.

Defendant Edna Anton has shown a need for the testimony, has shown the substance of the testimony, as well as the exculpatory nature of the testimony, and that Defendant Peter Anton is likely to testify at a separate trial. The remaining considerations indicate that severance should be granted: Peter Anton's testimony forms a significant part of Mrs. Anton's defense theory; the absence of the testimony would prejudice her defense since it is the only evidence as to her lack of knowledge or intent; the severance would not affect judicial administration or economy; and the motion is timely. Therefore, Defendant Edna Anton's Motion to Sever is granted. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant Peter Anton's Motion to Suppress Evidence Seized Pursuant to Executed Search Warrant, Doc. 58, is denied;

2. Defendant Edna Anton's Motion to Sever Defendant, Doc. 71, is granted.

DONE AND ORDERED this *22nd* day of March, 2007

s/ *Maurice M. Paul*
Maurice M. Paul,
Senior District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13124-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER A. ANTON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Dec. 24, 2008)

Before: BARKETT and WILSON, Circuit Judges, and GOLDBERG,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT
JUDGE

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the assistance of counsel for his defense.

CHAPTER XXXV

CORRECTIONAL SYSTEM

PAROLE

August 28, 1942. – 042-427.

CIVIL RIGHTS – LOSS AND RESTORATION IN CONVICTED FELONIES

QUESTION:

* * *

(3) Is a person who has been found guilty of a felony in this State and placed on probation with the suspension of imposition of sentence deprived of his civil rights in this state?

* * *

To Hon. Francis R. Bridges, Jr., Chairman, Florida Parole Commission:

* * *

(3) The statutes depriving one of civil rights do so when one has been "convicted" of any of the offenses prescribed in those statutes. The word "convicted" in such a statute, where it relates to legal effects of such, rather than the description of a particular step in a criminal proceeding, is interpreted to include the judgment and sentence of the court as well as the verdict. Accordingly, if imposition of sentence be suspended and the defendant be placed on probation, the defendant, although found guilty, is not "convicted" and does not, therefore, lose his civil rights under the statutes mentioned above. Page vs.

State Board of Medical Examiners, 141 Fla. 294, 193 So. 82 (1940); Smith vs. State, 75 Fla. 468, 78 So. 530 (1918).

In this state trial courts have power only to suspend the imposition of sentence, but do not have power to impose sentence and then suspend the execution of it. (Section 948.01(3), Florida Statutes, 1941).

Accordingly, I must answer this question in the negative.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES
OF AMERICA

v.

PETER ANTHONY ANTON /

CASE NO.
1:06-cr-00029-MP-AK

DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Defendant, PETER ANTHONY ANTON, by and through his undersigned counsel, and pursuant to Title 18 U.S.C. § 922(g), hereby files Defendant's Motion to Dismiss for Lack of Jurisdiction and in support thereof, states the following:

1. On August 22, 2006, the government filed a two count indictment charging Defendant, PETER ANTHONY ANTON, with knowingly possessing firearms and ammunition by a convicted felon in violation Title 18 U.S.C. § 922(g), 924(a) and (2).

2. Witnesses for the government wrongfully testified that the Defendant had previously pled guilty to a crime punishable by a term of imprisonment exceeding one year and that he is a convicted felon for purposes of Title 18 U.S.C. § 922(g).

3. ATF Special Agent Shannon B. Desmond's affidavit erroneously alleged that Defendant Anton was a convicted felon by virtue of the fact that "On

March 20, 1989, Peter A. Anton plead guilty to Grand Theft, a felony offense, case number 88-387CFB in the Circuit Court in and for Levy County, Florida, and was sentenced to a term of 5 years probation." (*See,* paragraph 4, on page 2, of Desmond's affidavit).

4. Contrary to Desmond's sworn affidavit, on March 20, 1989, Defendant Anton entered a plea of *nolo contendere,* pursuant to a negotiated plea bargain, to one (1) count of Grand Theft, in the Eighth Judicial Circuit, Levy County, Florida. The Honorable Osee R. Fagan ordered and adjudged that the "imposition of sentence" be withheld and the Defendant was placed on probation for a period of five (5) years under the supervision of the Department of Corrections and its officers. *See* Attachment A.

5. The court adjudged that the Defendant was not likely again to engage in a criminal course of conduct, and the ends of justice and the welfare of society do not require that he should suffer the penalty authorized by law. The language used by the judge was verbatim from Florida Statute § 948.01(2).

6. The Defendant was placed on probation and advised that he could possess weapons or firearms by first securing the consent of his probation officer.

7. Defendant Anton successfully completed probation and he was discharged from probation by court order dated April 16, 1992. Probation was terminated and he was no longer under the supervision of a probation office.

8. ATF Special Agent Desmond and the government, after all discovery presented and supporting documents, has failed to present a prima facie case showing Defendant Anton is a convicted felon, and unable to legally possess a weapon. Agent Desmond opined in her affidavit that Anton's handling and/or sale of firearms constituted violations of Title 18, U.S.C. § 922(g)(1) (prohibiting the possession of firearms by convicted felons), and Title 18, U.S.C. § 922(a)(1)(a) (making it unlawful for any person other than a licensed dealer to engage in the business of dealing in firearms). *See*, paragraphs 32 and 33, pages 12-13, of affidavit.

9. The Defendant, PETER ANTHONY ANTON, is not a convicted felon under Florida law or under Title 18 U.S.C. § 922(g)(1) or 924(a)(2) and (2) and therefore there is an insufficient legal predicate to evoke this Court's jurisdiction regarding an offense against the United States of America by the Defendant, PETER ANTHONY ANTON.

MEMORANDUM OF LAW

The term conviction in Federal Law is defined differently in sentencing issues as opposed to supporting a conviction for the underlying offenses for 922(g)(1).

In Florida Statute § 775.14, Florida law provides a limitation on withheld sentences, provided as follows: "Any person receiving a withheld sentence upon conviction for a criminal offense, and such

withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

A review of Florida law reveals that the terms "convicted" or "conviction" are defined in a variety of ways depending on the context in which they are used. *See*, e.g., *United States v. Thompson,* 756 F. Supp. 1492, 1493 (N.D. Fla. 1991) (discussing different contexts in which Florida law defines "conviction"); *Burkett v. State*, 518 So.2d 1363 (Fla. 1st DCA 1988) (same).

What constitutes a conviction for § 922(g)(1) "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *18 U.S.C. § 921*(a)(20). Chapter 775.14 of the Florida Statutes states that "any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of 5 years, **shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld**."

Peter Anton's sentence and conviction was withheld pursuant to Chapter 948.01(2) of the Florida Statutes, which states that: "If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its

discretion, may either adjudge the defendant to be guilty or stay and without the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation."

In *Clinger v. State of Florida*, 533 So.2d. 315 (Fla. App. 5 Dist. 1988), the court held that under Florida law, conviction means a determination of guilt, **whether or not an adjudication was withheld**. A defendant is not adjudicated guilty and no judgment of conviction is entered against a defendant when the imposition of sentence is stayed and withheld and the defendant is placed on probation or community control under section 948.01(3), Florida Statutes. *Clinger v. State of Florida* at 316.

In *United States of America v. Willis*, 106 F.3d. 966 (11th Cir.1997), Willis was charged with violation of 18 U.S.C. § 922(g)(1), possession of a firearm by convicted felon. As his alleged, predicate "conviction," Willis pleaded *nolo contendere* to charges brought against him by the State of Florida for carrying a concealed firearm and grand theft of a firearm. Title 18 U.S.C. § 922(a)(20), states that "conviction" within the meaning of Section 922(g)(1) is to be determined in accordance with the law of the jurisdiction in which the proceeding was held. Florida law provides that a conviction requires either an adjudication of guilt by verdict of the jury or a plea of guilty. *Garron v. State*, 528 So.2d. 353, 360 (Fla.1988); *State v. Gazda*, 257 So.2d. 242, 243-244 (Fla.1971); *see also United States v. Thompson,* 756 F.Supp. 1492 (N.D.Fla.1991).

A *nolo contendere* plea, however, does not amount to confession of guilt. *Gazda,* 257 So.2d. at 243-44; *Thompson,* 756 F.Supp. at 1496. Thus a *nolo contendere* plea is not a conviction under Florida law. Because Willis had not been "convicted" of a felony under Florida law, section 922(g)(1) is inapplicable, and the district court erred by refusing to dismiss count two of Willis's indictment.

The order of the District Court was reversed, Willis's conviction under 18 U.S.C. § 922(g)(1) was vacated. *U.S. v. Willis* at 970.

WHEREFORE, based upon the foregoing facts and arguments contained herein, Defendant Anton respectfully moves this Court to grant Defendant's Motion to Dismiss for Lack of Jurisdiction for the reasons stated above.

Respectfully submitted,

s/ Gerald S. Bettman
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant's Motion to Dismiss for Lack of Jurisdiction has been furnished to by EM/ECF to Greg McMahon, AUSA, 300 East University Avenue, Suite 310, Gainesville, Florida 32601 this 5th day of February, 2007.

s/ Gerald S. Bettman
ATTORNEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES
OF AMERICA

v.

CASE NO.
1:06-cr-00029-MP-AK

PETER ANTHONY ANTON /

DEFENDANT'S MOTION TO DISMISS AND/OR REQUEST TO ACKNOWLEDGE DEFENDANT'S RIGHT TO PRESENT AN AFFIRMATIVE DEFENSE THAT HIS CIVIL RIGHTS HAD BEEN RESTORED BY THE COURT'S ORDER AND BY OPERATION OF LAW

The Defendant, PETER ANTHONY ANTON, by and through his undersigned counsel, and pursuant to Title 18 U.S.C. § 921(a)(20) and 922(g), hereby files Defendant's Motion to Dismiss and/or Request to Acknowledge Defendant's Right to Present an Affirmative Defense that his Civil Rights Had Been Restored by the Court's Order and by Operation of Law, and in support thereof, states the following:

1. Under Florida law, the Defendant is not a convicted person after full completion of his probation if his sentence had been suspended, withheld, stayed or set aside. The Florida Attorney General was asked this question which was answered on August 28, 1942. The Attorney General opinion (042-427) (Opinion Attached) is as follows:

(3) Is a person who has been found guilty of a felony in this state and placed on probation with the suspension of imposition of sentence deprived of his civil rights in this state?

Answer: The statutes depriving one of civil rights do so when one has been "convicted" of any of the offenses prescribed in those statutes. The word "convicted" in such a statute, where it relates to legal effects of such, rather than the description of a particular step in a criminal proceeding, is interpreted to include the judgment and sentence of the court as well as the verdict. Accordingly, if imposition of sentence be suspended and the defendant be placed on probation, the defendant, although found guilty, is not "convicted" and does not, therefore, lose his civil rights under the statutes mentioned above. Page vs. State Board of Medical Examiners, 141 Fla. 294, 193 So. 82 (1940); Smith vs. State, 75 Fla. 468, 78 So. 530 (1918).

In this state trial courts have power only to suspend the imposition of sentence, but do not have power to impose sentence and then suspend the execution of it. (Section 948.01 (3), Florida Statutes, 1941).

Accordingly, I must answer this question in the negative.

2. On August 22, 2006, the government filed an indictment charging Defendant, PETER ANTHONY ANTON, in only one count which charged that he was knowingly possessing firearms and ammunition as a convicted felon in violation Title 18 U.S.C. § 922(g),

924(a) and (2). At a previous Motion to Dismiss hearing this Court determined that as a matter of law the Defendant was adjudicated guilty in 1989. It is not clear whether this Court has determined whether the Defendant has had his civil rights restored pursuant to the 1989 Judgment and by operation of law, and whether the Defendant will be allowed to argue and present evidence at trial that his prohibition was lifted by virtue of 18 U.S.C. § 921(a)(20). The Defendant maintains that all civil rights have been restored five years subsequent to the judge's Order pursuant to Florida Statute 948.01(2) which states that:

> "If it appears to the court upon a hearing of a matter that the defendant is not likely to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and in either case it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation."

> Title U.S.C. § 921(a)(20) lifts a convict's firearms disability if the convict "'has had civil rights restored" with respect to the conviction, unless the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." § 921(a)(20); *Beecham v. United States*, 511

U.S. 368, 372, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994).

Florida Statute § 948.04(2) and (3) provides that:

> Upon the termination of the period of probation, the probationer shall be released from probation and is not liable to the sentence for the offense for which probation was allowed.

3. In Defendant's previous filed Motion to Dismiss for Lack of Jurisdiction, the Court found that the Defendant had been adjudged guilty based on his 1989 Judgment and is therefore a convicted felon under 18 U.S.C. § 922(g). The Court, however, failed to address whether the Defendant had his civil rights restored once he successfully completed probation. If allowed at trial, the Defendant would present this defense to the jury.

4. The government alleges that the Defendant is a convicted felon for purposes of Title 18 U.S.C. § 922(g), having previously pled guilty to a crime punishable by a term of imprisonment exceeding one (1) year. However, based on the Defendant's restoration of civil rights, the Defendant is not a prohibited person as charged. The Defendant is asking this Court to decide this issue as a matter of law and/or whether the Court will allow the Defendant to raise this issue before a jury.

5. On March 20, 1989, Defendant Peter A. Anton entered a plea of *nolo contendere*, pursuant to a negotiated plea bargain, to one (1) count of Grand

Theft, in the Eighth Judicial Circuit, Levy County, Florida, case number 88-387CFB. The Honorable Osee R. Fagan ordered and adjudged that the "imposition of sentence" be withheld and the Defendant was placed on probation for a period of five (5) years under the supervision of the Department of Corrections and its officers. Judgment Attached.

6. The court adjudged that the Defendant was not likely again to engage in a criminal course of conduct, and the ends of justice and the welfare of society do not require that he should suffer the penalty authorized by law. The language used by the judge was verbatim from Florida Statute § 948.01(2).

7. The Judgment Placing Defendant on Probation stated "if you violate any of the conditions of your probation, you may be arrested and the court may revoke your probation, adjudge you guilty and impose any sentence which it might have imposed before placing Defendant on probation."

8. One of the conditions of his probation was that the Defendant will neither possess, carry, or own any weapons or firearms without first securing the consent of his probation officer. This indicates that the Court in 1989 believed that the Defendant had not been deprived of his civil rights as a matter of law.

9. Defendant Anton successfully completed probation and he was discharged from probation by court order dated April 16, 1992. Probation was terminated and he was no longer under the supervision of a

probation office. The government maintains of no other basis in which Anton can be described as a prohibited person.

10. Since the court withheld imposition of sentence upon successful completion of Anton's probation, Defendant Anton's civil rights had been automatically restored.

11. The Defendant, PETER ANTHONY ANTON, is not a prohibited person under Florida law or under Title 18 U.S.C. § 922(g)(1) or 924(a)(2) and (2) because his civil rights had been automatically restored five years after his suspended sentence.

MEMORANDUM OF LAW

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. Title 18 U.S.C. § 921 (a)(20).

Fla.R.Crim.P. 3.670, which provides in pertinent part that:

> If the defendant is found guilty, a judgment of guilty, and, if he has been acquitted,

> a judgment of not guilty, shall be rendered in open court and in writing, signed by the judge, filed, and recorded. However, the judge may withhold such adjudication of guilt if he places the defendant on probation.

The statutory authority for Fla.R.Crim.P. 3.670 is found in Fla. Stat § 948.01(3)(1987), which provides:

> If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him on probation.

The Attorney General's opinion specifically states that "if imposition of sentence be suspended and the defendant be placed on probation, the defendant although found guilty, is not 'convicted' and does not, therefore lose his civil rights under the statutes mentioned above." August 28, 1942. – 042-427.

In *Thomas v. State of Florida,* 356 So.2d 846 (4th DCA 1978) the court held that a suspended sentence is only available if a person is placed on probation, pursuant to Fla.Stat. § 948.01(4) (1975). Withholding and suspension of adjudication and sentence means the court declines to convict the defendant or fine or

imprison him until probation is tried. Withholding or suspending adjudication or sentence in a felony case can only be done when the defendant is put on probation, pursuant to Fla.Stat. § 948.01(3) (1975). If the defendant successfully completes his probation he is not a convicted person but if the probation is violated the court may then adjudicate and sentence.

In *United States v. Nix,* 438 F.3d. 1284 (11th Cir.2006) the court stated that the provisions of 18 U.S.C.S. § 922(g)(1) make it a crime for any person to possess a firearm after having been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. 18 U.S.C.S. § 922(g)(1). A conviction does not count for U.S.C.S. § 922(g)(1) purposes if the defendant has had his civil rights restored, unless the restoration expressly restricts the defendant's firearm rights. U.S.C.S. § 922(g)(1). Peter Anton's right to possess weapons was specifically given to him by the Court's Order. This is proof positive that the judge never intended to deprive him of his right to possess a gun. The only limitation was during probation.

In *United States v. Essick,* 935 F.2d. 28 (4th Cir.1991) the Defendant was convicted for possession of firearm by ex-felon after jury trial in the United States District Court for the Middle District of North Carolina. Defendant appealed contending that his conviction must be reversed because the government failed to prove that he was an ex-felon as that status is defined in the federal statute. The court reversed the holding and found that: (1) Government failed to

prove that defendant was ex-felon, as that status was defined in federal statute, by failing to prove that defendant's prior conviction in North Carolina was one for which civil right to possess firearm had not been restored, and (2) under North Carolina law, Government was required to prove, at minimum, that defendant possessed firearm within five years of release from supervision resulting from prior North Carolina felony.

The court found that North Carolina has specific statutory provisions regarding the restoration of the civil rights of one convicted of a crime. North Carolina General Statuses § 13-1 (1986) reads in relevant part: Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon the occurrence of any one of the following conditions: (1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.

The Fourth Circuit ruled that the prosecution under federal statute making it crime for ex-felon to possess firearm, Government is required to prove that prior felony conviction was one for which civil right to possess firearm under North Carolina law had not been restored as element of violation, and restoration of firearm and other civil rights was not matter of defense. Under the North Carolina firearm statutes, the only difference between the rights of an

ex-felon and one who has never been convicted of a felony is that the former must wait five years before being legally allowed to possess a handgun or other firearm with a barrel less than 18 inches in length.

Defendant Anton's civil rights had automatically been restored upon his successful completion of probation. Upon completion and discharge of his probation, Defendant Anton did not have a restricted period of time before he could legally possess and own firearms and thus he was not a convicted felon prohibitive from possessing any weapons or firearms.

WHEREFORE, based upon the foregoing facts and arguments contained herein, Defendant Anton respectfully moves this Court to grant Defendant's Motion to Dismiss and/or Request to Acknowledge Defendant's Right to Present an Affirmative Defense that his Civil Rights Had Been Restored by the Court's Order and by Operation of Law for the reasons stated above.

Respectfully submitted,

s/ Gerald S. Bettman
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to by EM/ECF to Greg McMahon, AUSA, 300 East University Avenue, Suite 310, Gainesville, Florida 32601 this 30th day of March, 2007.

s/ Gerald S. Bettman
ATTORNEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES
OF AMERICA

v.

CASE NO.:
1:06-cr-00029-MP-AK

PETER ANTHONY ANTON /

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO EXECUTED SEARCH WARRANT, AND SUPPORTING MEMORANDUM OF LAW

The Defendant, PETER ANTHONY ANTON, by and through his undersigned counsel, and pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure and the Fourth Amendment of the United States Constitution, hereby requests this Honorable Court to suppress the following evidence obtained in an unlawful search, to wit:

> Twenty-seven (27) firearms, ammunition, and firearms and ammunition receipts which were seized by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) pursuant to a search warrant issued on December 27, 2005, and executed on the residence, camper, and vehicles at [Home Address Omitted], and the residence located at [Home Address Omitted].

As grounds in support of this motion the Defendant states the following:

1. The search warrant executed on the residence and vehicles located at [Home Address Omitted] and the residence located at [Home Address Omitted] on December 28, 2005, was obtained through unreliable information provided by the affiant which was the basis of the affidavit upon which the search warrant was issued. Without that information, the warrant issued was insufficient as a matter of law.

2. The probable cause was incomplete for the basis for acquiring a search warrant to enter into any residence, camper, or vehicle. The information before the Magistrate did not indicate nor constitute the basis to believe that a crime had been committed, was being committed, or was about to be committed. The Magistrate should have determined whether the affidavit for this search warrant was based on an informant's tip. The reviewing court could not have found that the affidavit on its face established probable cause. It is not believed that the informant personally appeared and presented an affidavit or testified before the Magistrate. The judge was not able to evaluate the informant's knowledge, demeanor, and sincerity.

3. Even though a Magistrate judge's decision to issue a search warrant is to be given considerable weight, this search warrant is insufficient since the

supporting affidavit read as a whole in a realistic and common sense manner, fails to allege specific facts and circumstances to allow the judge to reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.

4. The search warrant was invalid since the affidavit failed to establish a substantial basis for concluding that there was probable cause for a search. The affidavit presented the Magistrate with mere conclusions and assertions of wrongdoing on the part of the defendant. All allegations arose from activities occurring at another place and at another time. There was no adequate factual foundation, based on testimony of an informant of unknown reliability, who was not presented to testify before the Magistrate that there was any contraband at a specific location or time which necessitated a search warrant. Under Florida law, the Defendant's sentence had been suspended and he was not to suffer any penalty authorized by law.

5. If the Government relies on the good faith exception, the burden then shifts to the Government to establish that police relied in good faith on judge's decision to accept the affidavit and issue the warrant. In this case the agent who prepared the affidavit, was present before the judge, and executed the search warrant.

6. The defendant can rebut a prima facie case that the agent was acting in good faith in obtaining

and executing the warrant. There is evidence to establish either that (1) the Magistrate wholly abandoned his judicial role, or otherwise failed in his duty to perform his neutral and detached function and not serve merely as a rubber stamp for the police and (2) the agent submitted an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

7. There were no factual basis in this case which could be used to ratify the search of the homes, camper, and vehicles, based on the use of essentially conclusory statements without corroboration. All directions to the premises described in the affidavit were defective.

8. All the information, either from the agent or CI, failed to divulge any details such as where in the homes, camper, or vehicles, the contraband would be located. There was no information which would indicate the frequency with which the defendant alleged to have sold guns and where guns may have been. No information which was corroborated, or based on a factual report by any individual.

STATEMENT OF FACTS

1. On December 27, 2005, United States Magistrate Judge Allan Kornblum, of the Northern District of Florida, issued a one-page search warrant authorizing Special Agent Shannon B. Desmond, of the Bureau of Alcohol, Tobacco and Firearms (ATF) to

search two (2) residences and two (2) vehicles, described as follows:

> A Residence and Vehicles Located at [Home Address Omitted]; and
>
> A Residence Located at [Home Address Omitted].

***See*:** Exhibit A, attached hereto (search warrant).

2. The above-referenced search warrant specifically authorized the seizure of "Firearms, ammunition and firearms and ammunition receipts." *See*: Exhibit A.

3. The above-referenced search warrant specifically stated that the residences and vehicle to be searched were located "in the Northern District of Florida." Chiefland, Florida, lies in Levy County, Florida, which in turn lies in the Northern District of Florida. No permission was granted for the search of the garage which is not attached to the home.

4. At the time Magistrate Kornblum issued the search warrant at bar he was sitting in Gainesville, Florida, which lies in Alachua County, Florida, which in turn lies within the Northern District of Florida. *See*: Exhibit A.

5. In issuing the search warrant Magistrate Kornblum specifically relied upon the Application and Affidavit for Search Warrant submitted to the Magistrate by Special Agent Shannon B. Desmond, which consisted of a one-page Application and a thirteen

(13) page Affidavit which itself contained four (4) "attachments" (Attachments A through D) totaling nine (9) additional pages, for a total of twenty-three (23) pages. *See*: Composite Exhibit B, attached hereto.

6. According to Special Agent Desmond's affidavit, the Defendant, Peter A. Anton, was the owner of record of the two vehicles, and the residence at [Home Address Omitted]. Agent Desmond's affidavit further stated that the residence at [Home Address Omitted], was "a residential premises listed by Levy County Property Records in the name of Peter A. & Edith R. Anton." *See*: Attachments A and B, contained in Composite Exhibit B. Edith R. Anton is the Defendant's mother.

7. Defendant Peter A. Anton was the documented owner of both of the residences in question and he possessed a reasonable expectation of privacy in both residences.

8. Special Agent Desmond's affidavit described the two (2) vehicles as follows:

> "a 1980 Tailgator mobile trailer, Florida tag E09KPB, utilized by Anton to transport gun show goods, and a 1995, green, Dodge Ram 2500 Club Cab pick up truck, Florida tag E84KPB, both are registered in the name of Peter Anthony Anton."
>
> *See*: Attachment A, contained in Composite Exhibit B.

9. Contrary to the affidavit's allegation, "Florida tag E09KPB" is a license tag attached to a 1980 boat trailer. That license tag was never attached to any vehicle Anton utilized to transport goods. Rather, Florida license tag E09KPB is the license tag for Anton's boat trailer and at all times this tag was attached to that boat trailer. At all times relevant, this boat trailer was always kept stored in a building, out of sight from the street and out of public view. There are no witnesses other than Agent Desmond who have claimed to be a witness of this alleged vehicle description. The information produced to the Magistrate was the result of a fictional account and acquired through public records. Agent Desmond was aware of this falsity and the means that was used to acquire this information. Additionally, the tag on the affidavit alleged to have been on Anton's 1995 truck had expired and was no longer in use at the time of the application for a search warrant.

10. Agent Desmond's affidavit alleged that Defendant Anton was a convicted felon by virtue of the alleged fact that "On March 20, 1989, Peter A. Anton plead guilty to Grand Theft, a felony offense, case number 88-387CFB in the Circuit Court in and for Levy County, Florida, and was sentenced to a term of 5 years probation." *See*, paragraph 4, on page 2, of affidavit. The Petitioner identifies the error as follows: The Petitioner entered a plea of nolo contendere, wherein the Court withheld imposition of sentence. However, it was misleading and confusing then as it is now, since the judge adjudged the Petitioner

guilty. The Petitioner was advised that the Court adjudged that the Petitioner was not likely again to engage in a criminal course of conduct, and the ends of justice and the welfare of society do not require that he should suffer the penalty authorized by law. Based on this indication the Petitioner was not advised properly that he would suffer any ramifications as a result of his plea of nolo contendere. The Petitioner was placed on probation, and advised that he could possess weapons or firearms by first securing the consent of his probation officer. The probation was later terminated and therefore he was not under the supervision of a probation officer. The Petitioner was advised by judgment that if he was to violate probation he would then be adjudged guilty, as if he had not been already judged guilty. The Petitioner successfully completed probation and was therefore under the impression that since his sentence had been withheld, and that he would not suffer the consequences of a judgment in this cause, he would not be adjudged guilty. The judgment entered in this cause seems to reflect the same judgment and sentence as a person who had their judgment withheld. The Petitioner never believed that he would not be able to have the right to possess a weapon as a result of his plea and sentence. He now has been informed that he could not legally possess a firearm.

11. Agent Desmond's affidavit alleged that Defendant Anton had been seen handling and/or selling firearms at various gun shows between July 5, 2005, and August 15, 2005, over four (4) months prior

to the issuance of the search warrant. *See*, paragraphs 19-23, pages 7-10, of affidavit.

12. Agent Desmond's affidavit was without the foundation of a criminal offense when it alleged that Edna Anton, the Defendant's wife, might have been in possession of certain firearms at her house at [Home Address Omitted], between August 9, 2004, and November 23, 2004, over one (1) year prior to the issuance of the search warrant. *See*, paragraphs 15-18, pages 5-7, of affidavit. Edna Anton is not a convicted felon and her possession of said firearms, even if true, did not violate any state or federal laws. This statement did not support the requirement that a crime was being committed at any specific place by Edna Anton.

13. Agent Desmond did not completely understand, nor did she show to the issuing Magistrate, the supporting documents surrounding whether Defendant Anton was a convicted felon, and unable to legally possess a weapon. Agent Desmond opined in her affidavit that Anton's handling and/or sale of firearms constituted violations of Title 18, U.S.C. § 922 (g)(1) (prohibiting the possession of firearms by convicted felons), and Title 18, U.S.C. § 922(a)(1)(a) (making it unlawful for any person other than a licensed dealer to engage in the business of dealing in firearms). *See*, paragraphs 32 and 33, pages 12-13, of affidavit.

14. Significant portions of the information regarding Anton's alleged handling of firearms, which

agent Desmond cited and relied upon in her affidavit, came from an unnamed confidential informant of unknown reliability. *See*, paragraphs 19 and 20, pages 7-8 of affidavit; paragraph 24, page 10 of affidavit. All allegations of any crime did not occur at the places which were designated to be searched. The search warrant did not allow for the search of a 2002 Keystone camper, and the commercial structure approximately 300 feet from the other locations described in the search warrant.

15. Agent Desmond's affidavit contains absolutely no factual information or allegations that anybody, at any time ever saw any firearms at either of Anton's two residences. The affidavit is completely devoid of any facts, information or evidence suggesting that there was a crime(s) being committed at either of these two residences, much less any probable cause to believe that a crime(s) was being committed at these residences.

16. The *entire* basis for the justification for a search warrant of Anton's residences and vehicles is contained in paragraph 29, on page 11 of Agent Desmond's affidavit which consists of nothing more than rank, boilerplate speculation. That paragraph, in its entirety, reads as follows:

> 29. Based upon your affiant's past experience and training as a Special Agent with ATF your affiant knows that convicted felons and dealers of firearms, who possess firearms, commonly maintain firearms, ammunition, sales receipts and other documents

> related to the ownership of said firearms and ammunition in their residences. These receipts may be evidence of a "straw purchaser" who bought firearms from a licensed dealer for the convicted felon, or may be typewritten or handwritten receipts to or from individual buyers or sellers. Additionally, your affiant knows that convicted felons who possess firearms (and indeed anyone who possessed firearms) commonly store firearms and ammunition for those firearms in their residences or other secure areas on their property.

There is a difference between a convicted felon and a dealer of firearms. The evidence before the affiant was that the firearms were locked and secured in a trunk. This fact was true at the time of the search, and there was never any evidence contrary to the veracity of this fact learned by the affiant. There was no need for Desmond to arbitrarily and capriciously, without probable cause of any additional offense, to believe that firearms would be in any other location. The mention that firearm dealers keep their records at home is contrary to the law, and firearms dealers are not known to be convicted felons, and are mandated to keep their records and firearms at their place of business. Any information about firearm dealers was irrelevant to support that agent's experience in support of probable cause in an affidavit.

17. The Application and Affidavit for Search Warrant was submitted to the Magistrate at 4:01 p.m., on December 27, 2005, and the Magistrate

signed and issued the search warrant at 4:10 p.m., that same day. This left, at best, only nine (9) minutes for the Magistrate to read, analyze and comprehend the twenty-three (23) pages contained in the Application and Affidavit for Search Warrant. *See*, Exhibit A (search warrant), attached hereto, which is time-stamped.

18. On March 20, 1989, Defendant Anton entered a plea of *nolo contendere*, pursuant to a negotiated plea bargain, to one (1) count of Grand Theft, in the Eighth Judicial Circuit, Levy County, Florida. This is the alleged felony conviction cited and relied upon by Agent Desmond in her affidavit as the predicate felony which allegedly rendered unlawful any possession or sales of firearms by Anton. Anton has no other felony convictions(s). However, pursuant to the negotiated plea bargain Judge Osee R. Fagan "withheld the imposition of sentence" and instead placed Anton on five (5) years probation, which Anton successfully completed. Anton was discharged from probation by court order dated April 16, 1992. The original "Judgment of Guilt and Placing Defendant on Probation" order specifically listed eight (8) "conditions of probation." Condition number four stated that:

> (4) You will neither possess, carry or own any weapons or firearms *without first securing the consent of your Probation Officer.*

See, Exhibit C, attached hereto (emphasis added). The wording of this judgment, combined with the

wording of condition #4 of Anton's Conditions of Probation (which is part of the actual judgment) which stated that Anton *could* possess a firearm(s) providing he first obtained permission from his probation officer, indicates that a reasonable person could reasonably conclude that Anton's actual judgment of conviction was "withheld" and that he was not a "convicted felon" under the law and that Anton had not lost his legal and constitutional right to possess a firearm(s). In fact, the judgment warns in the future tense in his judgment, that if any condition of probation was violated "the Court may revoke your probation and adjudge you guilty."

MEMORANDUM OF LAW

Defendant Anton submits that the search warrant in question, and its supporting affidavit, is fatally defective and constitutionally infirm for numerous reasons, including but not necessarily limited to the grounds set forth below:

For probable cause to exist, information supporting government's application for search warrant must be timely as probable cause must exist when the Magistrate issues search warrant; warrant applications based on stale information fail to create probable cause that improper conduct is continuing. Even stale information is not fatal a to search warrant if the government's affidavit updates, substantiates, or corroborates stale material. This did not occur in this case.

To satisfy the probable cause standard, the government "must reveal facts that make it likely that the items being sought are in that place when the warrant issues." *United States v. Domme,* 753 F.2d 950, 953 (11th Cir.1985). For probable cause to exist, however, the information supporting the government's application for a search warrant must be timely, for probable cause must exist when the Magistrate judge issues the search warrant. *See Sgro v. United States,* 287 U.S. 206, 210, 53 S.Ct. 138, 140, 77 L.Ed. 260 (1932) ("[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."); *United States v. Bascaro,* 742 F.2d 1335, 1345 (11th Cir.1984); and *Domme,* 753 F.2d at 953. Warrant applications based upon stale information fail to create a probable cause that similar or other improper conduct is continuing. *Bascaro,* 742 F.2d at 1345. *United States of America v. Greg Harris, Angelo Vargas, Vernon Copeland, Fredel Williamson, aka Fred Williamson.* 20 F.3d 445 (11th Cir.1994).

Did the affidavit provide the Magistrate with a "substantial basis" to rule that there was probable cause? *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). If the question is answered in the affirmative, then it follows that the officer's actions were reasonable. On the other hand, if this question is answered in the negative, then we must ascertain the answer to the question: Could the officer have *reasonably believed* that the facts set forth in the affidavit were sufficient to support a

Magistrate's finding of probable cause? *See United States v. Leon,* 468 U.S. 897, 920-24, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *see also United States v. Danhauer,* 229 F.3d 1002, 1005-07 (10thCir.2000); *United States v. Dahlman,* 13 F.3d 1391, 1397-98 (10th Cir.1993).

In regards to the search warrant, since there was no evidence that a crime had occurred, it would be impossible for the police to corroborate the informant's statements. No investigation was done which would warrant an intrusion into the residence, camper, and personal vehicles, since there was no information to corroborate from the informant who acquired knowledge of events through firsthand observation. There is absolutely no detail about any of the ongoing activity with no information about the interval between the date of the events and police officer's application for the search warrant. *United States v. Jones,* 208 F.3d 603, 609 (7th Cir.2000); *Lloyd,* 71 F.3d at 1262 (7th Cir.1995); *United States v. Lamon,* 930 F.2d 1183, 1187-88 (7th Cir.1991).

The Magistrate judge's decision to issue a warrant "is to be given considerable weight" and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, fails to allege specific facts and circumstances to allow the judge to reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated. *United States v. Spry,* 190 F.3d. 829, 835 (7th Cir.1999) (internal quotations omitted). It is well-established that appellate courts

may not uphold a warrant issued based solely on conclusory allegations. "Even if the warrant application was supported by more than a 'bare bones' affidavit, a reviewing court may properly conclude that, notwithstanding the deference that Magistrates deserve, the warrant was invalid because the Magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances or because the form of the warrant was improper in some respect." *Leon,* 468 U.S. at 915, 104 S.Ct. 3405 (internal citation omitted).

If a defendant is successful in establishing the invalidity of the search warrant, the burden then shifts to the Government to establish that the police relied in good faith on the judge's decision to accept the affidavit and issue the warrant. *See Leon,* 468 U.S. at 924, 104 S.Ct. 3405. An officer's decision to obtain a warrant is *prime facie* evidence that he or she was acting in good faith. *See id.* at 921 n. 21, 104 S.Ct. 3405; *Gates,* 462 U.S. at 263, 103 S.Ct. 2317 (White J., concurring); *see also Fairchild,* 940 F.2d at 264-65; *Brown,* 832 F.2d at 994-95. Two ways that the defendant may rebut this *prima facie* case are by presenting evidence to establish either that: (1) the Magistrate "wholly abandoned his judicial role," or otherwise failed in his duty to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police"; *Leon,* 468 U.S. at 923, 914, 104 S.Ct. 3405; or (2) the officer submitted an affidavit "so lacking in indicia of probable cause as to

render official belief in its existence entirely unreasonable." *Id.* At 923, 104 S.Ct. 3405.

An officer may not rely upon a search warrant if he is aware or had reason to believe that the Magistrate improperly issued the warrant without meaningfully and critically evaluating the evidence presented at the probable cause hearing. *See, e.g., Stewart v. State,* 289 Ark. 272, 711 S.W.2d 787 (1986). *Cf. Brown,* 832 F.2d at 997; *United States v. Breckenridge,* 782 F.2d 1317, 1321 (5th Cir.1986).

The remaining issue, then, is whether the affidavit presented to the judge was "so lacking in indicia of probable cause," *Leon,* 468 U.S. at 923, 104 S.Ct. 3405, that no officer could have "harbored an objectively reasonable belief" to the contrary. *Id.* at 926, 104 S.Ct. 3405. In order to determine whether an officer could have relied in objective good faith on the Magistrate's decision to issue a search warrant, we limit our inquiry to whether the officer could have reasonably believed that the materials presented to the Magistrate judge (either in an affidavit or in some other respect such as testimony from the police officers) were sufficient to establish probable cause. *See Leon,* 468 U.S. at 915 & n 13, 923 n. 23, 104 S.Ct. 3405; *United States v. Bynum,* 293 F.3d 192, 210-13 (4th Cir.2002) (Michael J., dissenting); *United States v. Wilhelm,* 80 F.3d 116, 121-22 (4th Cir.1996); *United States v. Baker,* 894 F.2d 1144, 1149-50 (10th Cir.1990); *United States v. Hove,* 848 F.2d 137, 140 (9th Cir.1988). *United States v. Larry L. Koerth a/k/a Lonnie Younger,* 312 F.3d 862 (7th Cir.2002).

Where challenge is made to validity of search warrant affidavit under Fourth Amendment, Court must consider whether alleged misstatements in affidavit were made either intentionally or in reckless disregard for the truth, and, if so, whether, after deleting misstatements, affidavit is insufficient to establish probable cause. U.S.C.A. Const.Amend.4. Unlike an officer in the field, a Magistrate *1505 must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable. *Franks v. Delaware,* 438 U.S. 154, 165, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978); *David,* 714 F.2d at 900. *United States of America v. David Kirk,* 781 F.2d 1498 (11th Cir.1986).

A Magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable to issue search warrant. The hearsay and conclusions in this affidavit recitations is not only without any dates to establish recency but is without attribution or detail to establish reliability. "'[A] Magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable.' *Kirk,* 781 F.2d at 1505.

The basic criterion as to the duration of probable cause to issue search warrant is the inherent nature of the crime. "Where the affidavit recites a mere isolated violation it would not be unreasonable to

imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *United States v. Johnson,* 461 F.2d 285, 287 (10th Cir.1972).

"[T]he 'basic criterion as to the duration of probable cause [or staleness] is the inherent nature of the crime.'" *United States v. Magluta,* 198 F.3d 1265, 1271 (11th Cir.1999) (quoting *United States v. Bascaro,* 742 F.2d 1335, 1345 (11th Cir.1984)). *Supreme Court of Alabama. Ex parte State of Alabama. Re: Melvin Vinson, Jr. v. State of Alabama.* 843 So.2d 229 (Ala.2001).

For purposes of the rule that a warrant must be supported by facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time, the passage of time becomes less significant when the crime at issue is ongoing or continuous and the place to be searched is a secure operational base for the crime. U.S.C.A. Const.Amend.4. *United States of America v. Andre Hyton,* 443 F.3d 480 (6th Cir.2006).

In determining whether probable cause exists to support the issuance of a search warrant, the issuing official must consider the totality of the circumstances. And while the weight of each item when assessed separately may be slight, together they suffice to corroborate Joseph's story; and, when

viewed under the "totality-of-the-circumstances" standard, *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), *United States of America v. Lawrence L. Olson,* 408 F.3d 366 (7th Cir 2005).

1) ***Lack of Probable Cause:*** The Fourth Amendment to the U.S. Constitution specifically requires that probable cause support each search warrant issued. *Ornelas v. United States,* 517 U.S. 690, 695 (1996). The existence of probable cause "must be determined by an analysis of the totality of the circumstances surrounding the intrusion." *Illinois v. Gates,* 462 U.S. 213, 238 (1983). The Supreme Court defines probable cause as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Id*, 15 238. A boilerplate affidavit submitted by the police which lacks the necessary facts and detail to establish a fair probability of the existence of contraband, or of a crime, fails to meet the "warrant requirement" set forth in *Katz v. United States,* 389 U.S. 347, 357 (1967). This lack of detail makes it impossible for a "neutral and detached" judicial officer to independently assess whether police have probable cause to conduct a search. *Johnson v. United States,* 333 U.S. 10 (1948); *Warden v. Hayden,* 387 U.S. 294, 301-02 (1967). In the instant case Anton submits that the affidavit submitted to the Magistrate by Agent Desmond in support of the search warrant was facially defective on multiple grounds and provided no substantial basis for a finding of

probable cause. These grounds include, but are not necessarily limited to the following:

A) Lack of Probable Cause that Firearms Were in Either Residence: The affidavit completely fails to state, allege or even hint that anybody, at any time ever saw any firearms in either Anton's primary residence at [Home Address Omitted], or in the house next door where Anton's mother resided, at [Home Address Omitted]. In short, nobody ever saw any firearms in either residence (or vehicles), nor did anybody at any time report seeing any firearms there. It is *only* Special Agent Desmond's *guess* that firearms "may" have been there, a guess based simply upon Agent Desmond's bare intuition and/or rank speculation, *not* based upon any facts or evidence. This Court need only read paragraph 29, on page 11 of the affidavit (which contains the only assertion that firearms might be located in the residences) to discern that there existed *no evidence,* and hence no probable cause, to believe that firearms were located in either of the residences or in the vehicles. *See*, *e.g.*, *U.S. v. Johnson,* 256 F.3d 895, 905-06 (9th Cir. 2001) (no probable cause to search property for suspect because officer's "gut feeling" that suspect would be on property is insufficient without objective facts to support hunch).

B) Lack of Probable Cause that a Crime(s) Was Being Committed at Either Residence: Even assuming, arguendo, that there was probable cause to believe that firearms were at either or both of the residences, there still existed no probable cause to believe that a

crime or crimes were being committed. Agent Desmond ignored the evidence indicating that any such firearms were under the custody and control of Edna Anton, the Defendant's wife. Edna Anton had a legal and constitutional right to possess the firearms in question, and in fact she possessed them pursuant to the stipulation, knowledge, agreement, and permission of the ATF itself. There was *no* evidence in the affidavit indicating that Defendant Anton had actual or constructive possession of any firearms located at the residences, and *no* evidence in the affidavit that Anton was dealing firearms from his residence, which were the two (2) supposed crimes alleged in the affidavit as justification for the search. In short, there was no evidence to support an inference that there existed "a fair probability that contraband or evidence of a crime [would] be found in a particular place," *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Because the evidence in the affidavit must provide the Magistrate with a "substantial basis" for the probable cause determination, *Gates,* 462 U.S. at 238-39, and because no such evidence existed in Agent Desmond's affidavit, it follows that no probable cause existed to support the issuance of the search warrant at bar.

C) Lack of Probable Cause Due to Staleness of the Information: It is well settled that a search warrant is invalid if the information in the affidavit supporting the probable cause determination is stale. *See, e.g., U.S. v. Klagner,* 989 F.2d 69, 74-75 (2d Cir.1993) (information stale because it merely indicated that suspect made one (1) sale of small amount of

marijuana in home more than 6 weeks before search); *U.S. v. Helton,* 314 F.3D 812, 822 (6th Cir.2003) (allegations in search warrant affidavit regarding stored drug money were stale when based on report 2 months old because "stacks of money" not likely to be still present when warrant executed). In the instant case Agent Desmond's affidavit alleged that Anton's wife, Edna Anton, *may* have been in possession of certain firearms at her house at [Home Address Omitted], between August 9, 2004, and November 23, 2004, which was well over one (1) year prior to the issuance of the search warrant on December 27, 2005. (*see*: paragraph 12, Statement of Facts, *supra*). The affidavit further alleged that Defendant Anton had been handling and/or selling firearms at certain public gun shows between July 5, 2005, and August 15, 2005, some 4½ to 5½ months prior to the issuance of the search warrant (*see*: paragraph 11, Statement of Facts, *supra*). These alleged facts were so distantly removed in time from the date of the issuance and execution of the search warrant as to render the information stale and the warrant invalid. *Accord, U.S. v. Zimmerman,* 277 F.2d 426, 435-36 (3d Cir.2002) (information that was 6 months old was stale); *Emery v. Holmes,* 824 F.2d 143, 148-49 (1st Cir.1987) (information was stale where it was 5 months old).

D) Lack of Probable Cause Due to Unreliability of Confidential Informant: To the extent Agent Desmond's affidavit cited and relied upon information provided by the unnamed and unidentified confidential informant (*see,* paragraphs 19, 20 and 24, on pages 7, 8 and 10 of

affidavit) this information was inherently unreliable and cannot support a finding of probable cause. Agent Desmond did not identify the informant and did not provide any evidence which independently corroborated the reliability of this informant. *See, e.g., U.S. v. Wilhelm,* 80 F.3d 116, 119-20 (4th Cir.1996) (no probable cause for search warrant when police relied upon information from unnamed informant, had no indication of informant's truthfulness or reliability, and had little or no corroboration); *U.S. v. Danhauer,* 229 F.3d 1002, 1006 (10th Cir.2000) (no probable cause for search warrant because affidavit failed to establish basis of knowledge or veracity of confidential informant and to establish sufficient independent corroboration of informant's tip).

2) ***Magistrate's Insufficient Assessment and Consideration of Affidavit:*** In the case at bar the Magistrate took only nine (9) minutes to consider and assess the 23-page application, affidavit and its attachments before issuing the search warrant. Anton submits that this was manifestly an insufficient amount of time for the Magistrate to perform his constitutional duty to make and independent assessment regarding probable cause. To satisfy the warrant requirement, an "impartial judicial officer" must independently assess whether the police have probable cause to conduct a search and to seize evidence or contraband. *Warden v. Hayden,* 387 U.S. 294, 301-02 (1967). The Magistrate must carefully consider all of the facts and circumstances presented in the warrant application, including the supporting affidavit, in a practical, common-sense manner and then

make an independent assessment regarding the existence of probable cause. *Aguilar v. Texas,* 378 U.S. 108, 109, 111-13 (1964). The buffer, of a neutral and detached Magistrate, is a crucial protection of the Fourth Amendment. *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Under the facts of this case it was impossible for the Magistrate to perform his constitutionally mandated duty where the Magistrate took only nine (9) minutes, at most, to consider and assess the 23-page application.

3) ***Anton's 1989 State Court Judgment Did Not Preclude Him From Possessing Firearms:*** Anton submits that his 1989 State Court Judgment did not preclude him from possessing firearms (*see*: paragraph 18, Statement of Facts, *supra*), and as such this issue should have been brought to the attention of Magistrate Kornblum for his consideration and assessment before issuing the search warrant. If Anton's interpretation of his 1989 state court judgment is correct then it would have precluded the issuance of the search warrant as a matter of law. As such this information would have been crucial for the Magistrate to perform his constitutionally mandated duty of conducting an independent assessment of the existence of probable cause.

The Eleventh Circuit set a precedent in felons in possession cases which was established in *United States v. Orellanes,* 809 F.2d 1526 (11th Cir.1987), and *United States v. Grinkiewicz,* 873 F.2d 253 (11th Cir.1989). Relying on this precedent, the government asserts that under Florida law "the term 'conviction'

means determination of guilty by verdict of the jury or by plea of guilty, and does not require adjudication by the court." *Orellanes,* 809 F.2d at 1528. Thus, a person is "considered a convicted felon when there has been a withholding of adjudication of guilty."

While the *Orellanes* precedent does hold that under Florida law a withheld adjudication of a jury verdict or a plea constitutes a "conviction," this ruling only applies during the interval within which the adjudication remains withheld, that is, during the interval within which the defendant remains on probation. *See, e.g., Thomas v. State,* 356 So.2d 846, 847. *United States v. Gispert,* 864 F.Supp.1193, Southern Dist. Fla. (1994).

In Florida Statute § 775.14, Florida law provides a limitation on withheld sentences, provided as follows: "Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

A review of Florida law reveals that the terms "convicted" or "conviction" are defined in a variety of ways depending on the context in which they are used. *See,* e.g., *United States v. Thompson,* 756 F. Supp. 1492, 1493 (N.D.Fla. 1991) (discussing different contexts in which Florida law defines "conviction"); *Burkett v. State,* 518 So.2d 1363 (Fla. 1st DCA 1988) (same). Florida Statute § 790.23, which is

Florida's equivalent statute to 18 U.S.C. § 922(g)(1), and the line of cases discussing this Florida statute, are the most instructive in the present context.

What constitutes a conviction for § 922(g)(1) "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *18 U.S.C. § 921*(a)(20). Section 922(a)(20) also provides that "any conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction . . . unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms." *United States v. Lloyd,* 184 Fd.3d 695 (7th Cir.1999).

Chapter 775.14 of the Florida Statutes states that "any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of 5 years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

Chapter 948.01(2) of the Florida Statutes states that "If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and without the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence

upon such defendant and shall place the defendant upon probation."

WHEREFORE, based upon the foregoing facts and arguments contained herein, Defendant Anton respectfully moves this Court to grant him the following relief:

1. That this Court hold that the search warrant at bar in this case is invalid;

2. That this court order that all of the evidence seized during the execution of this search warrant be suppressed;

3. That this Court conduct a full, plenary suppression hearing in order to fully develop the facts relevant to the disposition of this motion;

4. Any other relief which this Court deems appropriate and just.

Respectfully submitted,

/s/ Gerald S. Bettman
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Suppress Evidence has been furnished to by EM/ECF to Greg McMahon, AUSA, 300 East University Avenue, Suite 310, Gainesville, Florida 32601 this 22nd day of January, 2007.

/s/ Gerald S. Bettman
ATTORNEY

United States District Court
Northern District of Florida

In the Matter of the Search of

SEARCH WARRANT

A Residence [and vehicles /s/ AK] Located at [Address Omitted]; and

A Residence Located at [Address Omitted]

CASE NUMBER: 1:05mj40

TO: Special Agent Shannon B. Desmond, Bureau of Alcohol, Tobacco and Firearms and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Shannon B. Desmond who has reason to believe that [ ] on the person of or [x] on the property or premises known as (name, description and/or location)

A Residence [and vehicles /s/ AK] Located at [Address Omitted], more fully described by Attachment A to the Affidavit in Support of Search Warrant in this case, and

A Residence Located at [Address Omitted], more fully described by Attachment B to the Affidavit in Support of Search Warrant in this case

in the Northern District of Florida, there is now concealed a certain person or property, namely (describe the person or property)

Firearms, ammunition and firearms and ammunition receipts

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before January 5, 2006
Date

the person or place named above for the person or property specified, serving this warrant and making the search in the daytime – 6:00 A.M. to 10:00 P.M. and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Allan Kornblum
as required by law. U.S. Judge or Magistrate

12/27/05 4:10 pm
Date and Time Issued

Gainesville, Florida
City and State

/s/ Alan Kornblum
Alan Kornblum
U.S. Magistrate Judge

United States District Court
Northern District of Florida

In the Matter of the Search of

The residences located at [Address Omitted]. And a large concrete garage/barn/out building located on the premises of [Address Omitted]
A 1980 Tailgator mobile trailer, Florida tag E09KPB and
A 1995 green, Dodge Ram 2500 Club Cab pick up truck, Florida tag E84KPB

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

The residences are located in Levy County, which is in the Northern District of Florida. I Shannon Desmond being duly sworn depose and say:

I am a Special Agent with the Alcohol, Tobacco and Firearms and have reason to believe that

[ ] on the person of or [X] on the property or premises known as (name, description and/or location)

The residence located at [Address Omitted], further described as a two story single-family dwelling having concrete and stucco exterior finish, painted light yellow in color with white corner stucco trim, unpainted T-111 siding and having a brown shingle roof. Behind the main residential premises is a large garage/barn/out building having concrete finish painted light yellow in color. Parked next to the out building previously described is a 1980 Tailgator mobile trailer, Florida tag E09KPB utilized by ANTON to

transport gun show goods and a 1995 green, Dodge Ram 2500 Club Cab pick up track, Florida tag E84KPB. A mail box with the numbers "8471" appears on the curtilege directly in front of the residence, and The residence located at [Address Omitted], further described as a single story, single family dwelling having light beige aluminum siding and a flat gravel type roof. A mail box with the numbers "8451" appears on the curtilege directly in front of the residential premises to be searched. The residences are located in Levy County, which is in the Northern District of Florida.

there is now concealed property, namely

firearms, ammunition and firearms and ammunition receipts

WHICH IS evidence of criminal offenses and property intended to be used in committing criminal offenses, in violation of Title 18, United States Code, Section 922(g)(1).

The facts to support the issuance of a Search Warrant are as follows:
SEE ATTACHED AFFIDAVIT.
Continued on the attached sheet and made a part hereof. [X] yes [ ] no.

/s/ Shannon B. Desmond
Signature of Affiant
Special Agent Shannon Desmond

Sworn to before me, and subscribed in my presence 12-27-05 at Gainesville, Florida.
date

Allan Kornblum
United States Magistrate Judge /s/ Allan Kornblum
Signature of
Judicial Officer

AFFIDAVIT

I, Shannon B. Desmond, being duly sworn, state and depose the following:

1. Your affiant is a Special Agent with the Bureau of Alcohol, Tobacco and Firearms, (ATF) Jacksonville Field Office and has been so employed for 18 years. Prior to that your affiant was employed by the Alachua County Sheriff's Office, (ACSO) in Gainesville, Florida as a deputy sheriff for 8 years. During your affiant's employment with ATF she has received specialized training and participated as the case agent in numerous investigations involving federal firearm statutes related to those individuals who have been convicted of felony offenses and are in possession of firearms in violation of Title 18, U.S.C., Section 922(g)(1) and those individuals who engage in the business of dealing in firearms without a license in violation of Title 18, U.S.C., Section 922(a)(1)(A).

2. Your affiant submits this application in support of a search warrant for the properties described as residential premises of Peter A. ANTON located at [Address Omitted]. Your affiant has personally

observed said properties which are more particularly described in Attachments A and B.

3. As outlined below, based upon your affiant's personal observations, review of official ATF reports and information provided by the agents identified herein, your affiant has probable cause to believe Peter A. ANTON possesses firearms and ammunition, firearms and ammunition receipts which constitute evidence of crimes in violation of Title 18, U.S.C., Section 922(g)(1) and Title 18, U.S.C., Section 922(a)(1)(A) and are located in the premises more specifically identified in Attachments A and B.

4. On March 20, 1989, Peter A. ANTON plead guilty to Grand Theft, a felony offense, case number 88-387CFB in the Circuit Court in and for Levy County, Florida and was sentenced to a term of 5 years probation.

5. On November 19, 2000, as a result of ATF agent undercover purchases of two firearms from ANTON at the Lakeland Civic Center gun show located in Lakeland, Florida, Forty-six (46) firearms and twenty (20) rounds of ammunition ANTON possessed at that time were seized by ATF agents from his motor home he towed and used to transport his gun show goods. ANTON was a vendor at the gun show and was displaying firearms for sale. Title 18, United States Code, Section 922(g)(1) makes it unlawful for any person convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship, transport, possess or receive

firearms or ammunition in or affecting interstate commerce. As a result ANTON was subject to the Federal firearms disabilities imposed by Title 18, United States Code, Section 922(g)(1) and could not ship, transport, possess or receive firearms. Additionally, Title 18, United States Code, section 922(a)(1)(A) makes it unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer to engage in the business of importing manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearms in interstate or foreign commerce. ANTON was arrested by ATF agents for these violations.

6. On December 21, 2000 and January 24, 2001, ATF served Peter ANTON with notice of intention to seek administrative forfeiture of the firearms mentioned in paragraph 5.

7. On January 9, 2001, Peter ANTON surrendered a 9mm Sten Mark II type machine gun, serial number FP12704 to ATF Tampa Field Division agents.

8. On February 23, 2001, Edna Anton, wife of Peter ANTON filed a claim seeking the return of twenty-seven (27) of the seized firearms.

9. On August 14, 2002, a motion dismissing the criminal complaint against ANTON for possession of a firearm by a convicted felon and dealing in firearms without a license was filed in the Middle Judicial District, Tampa, Florida. The dismissal was granted pursuant to a cooperation agreement between ANTON

and the United States Attorney's Office in Tampa on other criminal matters.

10. On November 19, 2002, ANTON sent a letter to ATF requesting the release of seized firearms to him. This request was denied due to federal disabilities of ANTON as mentioned in paragraph 5. ATF further denied the request of Edna Anton for the release of the twenty-seven (27) firearms mentioned in paragraph 6 as documented in the ATF response letter, attached hereto and made part of this affidavit and herein after referred to as (Attachment C). Edna Anton, upon her own admission, had been directly involved in providing firearms or access to firearms to Peter ANTON in violation of Federal law.

11. On March 30, 2003, a certified letter from Ralph C. Ostrowski, ATF Special Agent in Charge, Tampa Field Division was sent via United States Postal Service to Peter and Edna Anton at [Address Omitted]. The letter stated in part, by way of background, the information contained in paragraphs 5 through 9 of this affidavit. The letter further addressed a request by Edna Anton in the November 19, 2002 letter to ATF that a consignment arrangement for the sale of the aforementioned firearms had been made with a Federal Firearms Licensee ("FFL"). ATF proposed the release of the twenty-seven (27) firearms claimed by Edna Anton directly to a "FFL" for the purpose of sale. ATF requested that a stipulation and agreement be completed by Edna Anton and returned to ATF to facilitate the sale of the firearms. It was further stated in the March 30, 2003 letter,

that the stipulation would not be considered to be valid by ATF if completed by Peter ANTON, rather than Edna Anton, as Peter ANTON'S direction of the disposition of the firearms may be considered constructive possession of the firearms in violation of Federal law.

In order to prepare a stipulation and agreement for the transfer of the firearms, Edna Anton was required to provide ATF with the name, licensee number, address and phone number of the "FFL" who had agreed to accept the firearms.

12. On May 15, 2003, a Stipulation and Agreement document prepared by ATF legal counsel, attached hereto and made part of this affidavit and herein after referred to as (Attachment D) was signed by Edna Anton, notarized and forwarded to the ATF Tampa Field Division providing for the release and transfer of the twenty-seven (27) firearms to Redland Enterprises, Incorporated, 22800 South West 207th Avenue, Miami, Florida 33170. Redland Enterprises is a "FFL".

13. On July 10, 2003, George Hodge, President, Redland Enterprises, Incorporated, took possession of the twenty-seven (27) firearms, pursuant to the previously identified stipulation.

14. On August 9, 2004, an official ATF multiple sale report documented the transfer of several firearms from John Stuckey, a "FFL" and owner of Southern Sportsman and Pawn Incorporated, Chiefland, Florida to Edna Anton. Your affiant knows from

her training and experience that a multiple sale report documents the transfer of two or more handguns to the same individual within a five day period of time. "FFL"s are required to complete the multiple sales report following the transfer of firearms and forward the reports to ATF. The following firearms were transferred to Edna Anton from Southern Sportsman and Pawn Incorporated, Chiefland, Florida: 1) Smith & Wesson, .38 caliber revolver serial number 13280; 2) Smith & Wesson, model 19, .357 caliber revolver, serial number TR8475; 3) Smith & Wesson, model 19, .357 caliber revolver, serial number 43K7893; 4) Smith & Wesson, model 36, .38 caliber revolver, serial number 180485; 5) Smith & Wesson, model 520, .357 caliber revolver, serial number N558478; and 6) Smith & Wesson, model 60, .38 caliber revolver, serial number 620086.

15. On August 9, 2004, Edna Anton completed an ATF F 4473, Firearms Transaction Form for the transfer of the six firearms described in paragraph 14 to her. Edna Anton stated her address on the 4473 transaction form as [Address Omitted]. Your affiant knows from having reviewed the firearms listed in the August 9, 2004 multiple sales transaction and the firearms listed in the May 15, 2003 stipulation, as referred to in paragraph 12, that five of the same firearms appear on each list.

16. On November 16, 2004, pursuant to the review of the August 9, 2004 multiple sales transaction, ATF Special Agent Donald Williams, Tallahassee Field Office conducted an interview with Peter

ANTON, [Address Omitted]. Special Agent Williams documented the interview in an official ATF report which stated in substance the following: ANTON admitted he was a convicted felon and was arrested by ATF agents in the fall of 2000 for possessing and selling firearms. ANTON stated his wife, Edna Anton had successfully appealed the seizure of twenty-seven (27) firearms from him and the firearms were subsequently transferred to Redland Enterprises Incorporated, Miami, Florida. ANTON stated that sometime early in 2004, George Hodge of Redland Enterprises Incorporated, contacted he and his wife Edna advising he had attempted to sell the firearms but had several remaining. ANTON stated Hodge told them he was moving to Kentucky, did not want to take the firearms with him and requested to transfer the remaining firearms to another dealer for sale. ANTON stated his wife Edna told him to transfer the firearms to Southern Sportsman in Chiefland, Florida. ANTON stated Edna Anton did in fact retrieve the firearms and put them in an unknown location away from his residence because be was a convicted felon. ANTON admitted he was aware of the provisions of the stipulation regarding the reclaiming and possession of the firearms and stated that he believed the transfer of the firearms to his wife did not violate the terms of the agreement.

17. On November 22, 2004, ATF Special Agent Don Williams telephonically contacted Edna ANTON at her Chiefland, Florida residence. Special Agent Williams documented the interview of Edna Anton in

an official ATF report which stated in substance the following: Mrs. Anton stated she had taken possession of firearms transferred from Redland Enterprises Incorporated to Southern Sportsman pursuant to her request after learning the Redland Enterprises Owner, George Hodge was moving. Mrs. Anton stated she had reviewed the stipulation with her husband Peter ANTON and they both concluded that if she received the firearms from Southern Sportsman and not directly from Redland Enterprises Incorporated, then she would not be in violation of the agreement if she kept the firearms away from her husband whom she knew to be a convicted felon. Mrs. Anton stated she was storing the firearms at her mother-in-law's home at [Address Omitted] in a locked trunk and that her husband Peter ANTON did not have access to them.

18. On November 23, 2004, ATF Special Agent Don Williams conducted a telephonic interview with John Stuckey, "FFL" and owner of Southern Sportsman and Pawn Incorporated, of Chiefland, Florida. Special Agent Williams documented the interview in an official ATF Report which in substance stated the following: Mr. Stuckey verified that he had in fact transferred the identified firearms to Edna Anton. Stuckey advised that prior to the transfer of the firearms to Edna Anton he received a call from Mrs. Anton who he knows personally. Mrs. Anton stated she needed to receive firearms that belonged to her from a "FFL" in Miami. She asked Stuckey if she could have the firearms delivered to him and pick

them up when they arrived. Mr. Stuckey stated he received the firearms mentioned above from Redland Enterprises Incorporated and on August 9, 2004 he transferred them to Edna Anton. Mr. Stuckey further stated he never was advised by Mrs. Anton that the firearms were subject to a forfeiture agreement with ATF.

19. On July 5, 2005, your affiant was advised by a cooperating witness ("CW"), who has provided reliable and verifiable information in the past, that ANTON was observed on Saturday, July 2, 2005 and Sunday, July 3, 2005 at a gun show in West Palm Beach, Florida at the South Florida Fair Grounds. ANTON was described as a vendor at the show and sold two firearms to a "FFL" dealer. The "CW" knew ANTON and was familiar with him from previous gun shows.

20. On July 11, 2005, your affiant was advised by the "CW" that on July 9, 2005, ANTON was a vendor at an Orlando, Florida gun show. The "CW" told your affiant that he/she overheard ANTON tell an unknown male that he could procure firearms for sale and that he, ANTON, would be at the up-coming gun show during the weekend of July 16th and 17th, 2005 in Melbourne, Florida.

21. On July 14, 2005, your affiant reviewed official ATF reports of multiple sales detailing the transfer of the following firearms by Francis J. Baldassare, a "FFL" to Edna Anton on March 27, 2004: 1) Smith & Wesson, model 60, .38 caliber revolver, serial

number R98711; 2) Smith & Wesson, model 59, 9mm pistol, serial number A648507; 3) Smith & Wesson, model 39, 9mm pistol, serial number A447686; 4) Smith & Wesson, model 41, .22 caliber pistol, serial number A600896; 5) Smith & Wesson, model 41, .22 caliber pistol, serial number A676813. Your affiant knows from the review of the firearms listed in the aforesaid stipulation, and the firearms listed above, that four of the firearms documented in the stipulation are the same firearms transferred above.

22. On July 16, 2005, pursuant to the information received that ANTON, was selling firearms without a license, Special Agents from the ATF Tampa and Jacksonville Field Offices, acting in an undercover capacity and at the direction of your affiant, attended the gun show at the Melbourne Auditorium, 625 East Hibiscus Boulevard, Melbourne, Florida. Your affiant showed the agents a current State of Florida driver's license photo of ANTON, DL# A535661520470 prior to the gun show and described his vendor display to them. Special Agent Mark Padget told your affiant the following: He observed Peter ANTON set up as a vendor with several tables displaying knives for sale. He observed ANTON holding a chrome plated revolver in conversation with an unknown white male. Special Agent Jeffery Brown advised your affiant that he observed ANTON with at least two handguns. He observed ANTON put the firearms in a cardboard box and place the box under ANTON'S display table. Special Agent Brian Neal advised your affiant, that he

observed ANTON show an unknown white male a chrome plated revolver. Special Agent Neal engaged the unknown white male in conversation and the unknown white male advised he was looking at a "J" frame revolver. Special Agent Neal told the unknown white male he was looking for a small .38 caliber revolver, at which time the unknown white male told Special Agent Neal the firearms did not belong to him but to the vendor (ANTON). ANTON advised Special Agent Neal the firearms were not for sale over the table and that he, ANTON, only sold to dealers. The meeting between Special Agent Neal and ANTON was electronically recorded and has been reviewed by your affiant.

23. On August 15, 2005, your affiant was advised by ATF Special Agent Stephen Barborini, West Palm Beach Field Office of the following: He and other ATF agents acting in an undercover capacity attended the gun show located at the South Florida Fairground, West Palm Beach, Florida that same date. He observed Peter ANTON set up as a vendor at the gun show offering hundreds of knives for sale. Your affiant had shown Special Agent Barborini a current State of Florida driver's license photo of ANTON, DL# A535661520470 prior to the gun show. Barborini told your affiant he was familiar with ANTON from previous shows. Special Agent Barborini engaged ANTON in conversation and at some point the conversation shifted to firearms. ANTON told Special Agent Barborini that he liked older revolvers like Smith & Wessons. Special Agent Barborini told

ANTON he also collected Smith & Wesson firearms (and had recently purchased a 1928 Brazilian contract) and he asked ANTON if he had any Smith & Wessons for sale. ANTON told Special Agent Barborini that he currently has "347 guns" and that he used to sell firearms at the gun shows. ANTON stated that he had some problems at the Lakeland show and that it was his demise. ANTON advised he had received some complaints so he didn't do it anymore.

24. Subsequent to Special Agent Barborini's contact with ANTON, your affiant interviewed the "CW". The "CW" confirmed that during previous contacts with ANTON, ANTON had stated he had more than 300 firearms.

25. On September 1, 2005, your affiant received official notification from the State of Florida, Office of Executive Clemency, Tallahassee, Florida that after a thorough search of the clemency records they found that Peter Anthony ANTON, date of birth [Date of Birth Omitted] has not applied for or received restoration of rights to receive, possess or transport in commerce any firearms or ammunition nor has he been granted a pardon of any kind by the Governor or Cabinet of the State of Florida in connection with a conviction in the State of Florida. Further there is no application pending for clemency for Peter ANTON.

26. On November 30, 2005, your affiant, with the assistance of Special Agent Baborini [sic], conducted a review the acquisition and disposition records of the "FFL", identified in paragraph 19.

27. On December 5, 2005, Special Agent Barborini advised your affiant that the review of the "FFL's" records verified that on July 2, 2005, at the South Florida Fair Grounds gun show, West Palm Beach, Florida, Peter ANTON sold a Smith & Wesson, model 520, .357 caliber revolver, serial number N558478 to the FFL. Additionally, on July 3, 2005 at the same location, Peter ANTON sold a Colt, Detective Special, .38 caliber revolver serial number B52534 to the same "FFL". Your affiant knows from reviewing the list of firearms transferred to Edna Anton on August 9, 2004 and the firearms listed in the stipulation, that the Smith & Wesson, model 520 mentioned above is the same firearm documented on both lists. The "FFL" was interviewed and verified observing other handguns in ANTON'S possession.

28. By reviewing ATF records and by training and experience, your affiant knows that of the hundreds of firearms manufacturers in existence, only a few are located in the State of Florida. Your affiant knows that Smith & Wesson firearms are manufactured in the State of Massachusetts. Your affiant also knows that Colt firearms are manufactured in the State of Connecticut. Therefore, your affiant believes and has probable cause to believe that the Smith & Wesson and Colt firearms ANTON sold to the "FFL" and identified in paragraph 27 traveled through interstate or foreign commerce.

29. Based upon your affiant's past experience and training as a Special Agent with ATF your affiant knows that convicted felons and dealers of firearms,

who possess firearms, commonly maintain firearms, ammunition, sales receipts and other documents related to the ownership of said firearms and ammunition in their residences. These receipts may be evidence of a "straw purchaser" who bought firearms from a licensed dealer for the convicted felon, or may be typewritten or handwritten receipts to or from individual buyers or sellers. Additionally, your affiant knows that convicted felons who possess firearms (and indeed anyone who possessed firearms) commonly store firearms and ammunition for those firearms in their residences or other secure areas on their property.

30. Your affiant knows as a result of the continuing investigation that Peter and Edna Anton continue to reside at the Chiefland addresses previously reported as they have for many years. Your affiant knows from having reviewed public records that both [Addresses Omitted] are listed in the name of Peter A. ANTON. Additionally, your affiant knows from having reviewed State of Florida Department of Highway Safety & Motor Vehicle driver's license information for Peter A, and Edna Alers Anton, both list their address as [Address Omitted].

31. Your affiant also knows as a result of the continuing investigation having traveled to the Melbourne gun show mentioned in paragraph 22 and more recently a gun show located at the Morocco Shrine Temple in Jacksonville, Florida; ANTON continues to use the same mobile trailer, noted in paragraph 5 to the gun shows. Within the last 3

months your affiant has personally observed this motor home on two occasions parked next to a large out building located on ANTON'S Chiefland, Florida residential premises. Your affiant has verified from reviewing State of Florida Department of Motor Vehicle records that both the mobile trailer and pick up truck used to tow the mobile trailer are registered in the name of Peter A. ANTON.

32. Your affiant knows from her training and experiences that Title 18, Section 922(g)(1) makes it unlawful for any person convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship, transport, possess or receive firearms or ammunition in or affecting interstate commerce.

33. Your affiant also knows from her training and experiences that Title 18, United States Code, section 922(a)(1)(A) makes it unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer to engage in the business of importing manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearms in interstate or foreign commerce.

34. Based on the investigation and the facts outlined above, Peter A. ANTON, after having been convicted in 1989 of the felony offense of Grand Theft, continued to possess firearms in violation of Federal law and has sold firearms at gun shows in violation of Federal law.

35. As a result of the facts outlined in the aforementioned affidavit, there is probable cause to believe that Peter ANTON possesses evidence, [fruits, instrumentalities, of firearm offenses /s/ SBD] that is; firearms, ammunition and firearms and ammunition receipts in violation of Title 18, Section 922(g)(1) and any and all documents demonstrating the transportation, possession, transfer and receipt of firearms and ammunition and/or any and all documents pertaining to dealing in firearms without a license in violation of Title 18, Section 922(a)(1)(A) at the property described in Attachments A & B.

/s/ Shannon B. Desmond
Shannon B. Desmond
Special Agent

/s/ A Kornblum 12-27-05

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA	**SEALED INDICTMENT**
v.	[1:06 CR 29 MP/AK]
PETER A. ANTON, and EDNA A. ANTON	(Filed Aug. 22, 2006)

THE GRAND JURY CHARGES:

COUNT ONE

That on or about December 28, 2005, in the Northern District of Florida the defendant,

PETER A. ANTON,

having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, aided and abetted by the defendant,

EDNA A. ANTON,

did knowingly possess firearms and ammunition in and affecting interstate commerce, that is:

1. On or about March 20, 1989, **PETER A. ANTON** was convicted in the Eighth Judicial Circuit in and for Levy County, Florida, for the offense of Grand Theft.

2. For this crime **PETER A. ANTON** was subject to punishment by a term of imprisonment exceeding one year.

3. Thereafter, **PETER A. ANTON** did knowingly possess the following firearms and ammunition:

a. a Taurus .357 caliber revolver;

b. a Sig Sauer model P230 9 millimeter pistol;

c. a Marlin model 9, 9 millimeter rifle;

d. a Ruger model 30, 7.62 caliber rifle;

e. a Colt Cobra .38 caliber revolver;

f. two Winchester model 94, 30-30 caliber rifles;

g. a Winchester model 94, .44 caliber rifle;

h. a Winchester model 64A, 30-30 caliber rifle;

i. two Winchester model 9422, .22 caliber rifles;

j. a Winchester model 94AE, .45 caliber rifle;

k. a Winchester model 9422XTR, .22 caliber rifle;

l. multiple rounds of .45 caliber Speer ammunition;

m. multiple rounds of .380 caliber Winchester-Western ammunition; and

n. multiple rounds of 7.62 X 39 millimeter Norinco ammunition.

4. These firearms and ammunition had previously been transported in interstate commerce.

All in violation of Title 18, United States Code, Sections 922(g), 924(a)(2) and 2.

COUNT TWO

That between on or about March 27, 2004, and on or about December 28, 2005, in the Northern District of Florida, the defendant,

EDNA A. ANTON,

knowingly disposed of firearms, that is:

1. two Smith and Wesson model 19, .357 caliber revolvers;

2. a Smith and Wesson model 520, .357 caliber revolver;

3. a Smith and Wesson model 41, .22 caliber pistol;

4. a Smith and Wesson model 39-2, 9 millimeter pistol;

5. two Smith and Wesson model 60, .38 caliber revolvers;

6. a Smith and Wesson model 59, 9 millimeter pistol;

7. a Smith and Wesson model 41, .22 caliber pistol; and

8. a Smith and Wesson model 36, .38 caliber revolver,

to Peter A. Anton, knowing and having reasonable cause to believe that Peter A. Anton had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, that Peter A. Anton had been convicted of the offense of Grand Theft.

All in violation of Title 18, United States Code, Sections 922(d) and 924(a)(2).

FIREARM FORFEITURE

The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Sections 924(a)(2) and 924(d)(1). Because the defendants,

PETER A. ANTON
and
EDNA A. ANTON,

knowingly committed the violation set forth in Count One of this Indictment, any and all interests which these defendants have in the firearms and ammunition involved in this violation are vested in the United States and hereby forfeited to the United

States pursuant to Title 18, United States Code, Section 924(d)(1).

/s/ Gregory R. Miller
GREGORY R. MILLER
United States Attorney

/s/ Gregory P. McMahon
GREGORY P. McMAHON
Assistant United States Attorney